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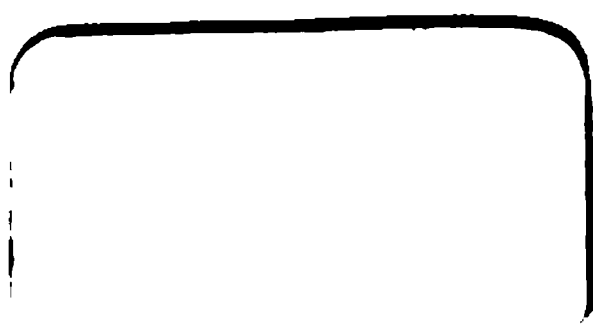
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

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SAN FRANCISCO.
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1881.

121673

JUL 29 1942

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ALBANY, N. Y.

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CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

NICKERSON V. BRIDGEPORT HYDRAULIC COMPANY.

(46 Conn. 24.)

Negligence — want of privity of contract.

A company, organized to supply the inhabitants of a city with water, contracted with the municipal authorities to supply their hydrants, but failing to do so, the fire department were unable to extinguish a fire in the city. *Held*, that the company were not liable in damages to the owner of the property destroyed. (See note, p. 5.)

ACTION of damages for negligence resulting in loss by fire. The opinion states the case. The case was reserved for this court.

A. S. Treat & W. K. Seeley, for respondent.

D. F. Hollister and H. S. Sanford, contra, cited *Atkinson v. Newcastle & Gateshead Water-works Co.*, L. R., 6 Exch. 404; *Couch v. Steele*, 3 El. & Bl. 402; *Rowning v. Goodchild*, 2 W. Bl. 906; *Metallic Compression Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277; s. c., 12 Am. Rep. 689.

Nickerson v. Bridgeport Hydraulic Company.

PARK, C. J. This action was brought to recover the value of certain property destroyed by fire in the city of Bridgeport.

The declaration contains three counts. The defendants have demurred, generally and specially, to the whole declaration ; and specially to each count in the declaration.

The case comes before us on a reservation of the questions of law arising on the demurrers.

We think each count is defective in substance ; and therefore we shall not consider whether there is a misjoinder of counts in the declaration, as is set forth in the special demurrer to the whole declarations. We will consider them in their order.

The material allegations in the first count are, that the defendants are a corporation, and were organized to supply the city of Bridgeport, its citizens and inhabitants, with an abundant supply of water, for domestic use and the extinguishment of fires, throughout the limits of the city ; that it was their duty to keep and afford an abundant supply for such purposes ; that in consideration thereof it also became their duty to pay, and they became liable to pay, all damages arising from neglect of this duty ; that they had contracted to furnish the plaintiffs an abundant supply for the extinguishment of fires on their premises, and to keep the water running through certain pipes for the purpose ; that the plaintiff's property, situated within the city (describing it), was destroyed by a fire on the 30th of September, 1872 ; that the plaintiffs were inhabitants of the city ; that it was the duty of the defendants, at the time of the fire, to have kept an abundant supply of water running through their pipes to extinguish the same ; that the defendants, their duty in this behalf not regarding, negligently and wrongfully shut off the water from their pipes, and the same was shut off during the entire time of the fire by their negligence ; and that the property described was destroyed in consequence of the wrongful acts of the defendants in shutting off and not supplying the water.

This count attempts to hold the defendants liable for the destruction of the plaintiffs' property on the ground that it was their duty to supply the plaintiffs with water sufficient to extinguish the fire in question, and that they neglected to perform this duty. But no facts are stated sufficient to establish any such duty on the part of the defendants. It is true the count states that the defendants are a corporation, organized to supply the inhabitants of Bridgeport with water to extinguish their fires. But does this create an

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obligation to supply the water without any thing more? A corporation is organized to manufacture woollen goods and sell them in the market. Does this alone create an obligation to manufacture the goods, and supply them to A., whether he pays any thing for them or not? It is not alleged in the count that the plaintiffs ever paid any thing, or even promised to pay any thing to the defendants for a supply of water to extinguish their fires. It is further alleged that the defendants contracted with the plaintiffs to supply them with water to extinguish their fires, but nothing appears to show precisely what the contract was; no terms or conditions whatever are stated. Whether the contract was in force or not at the time of the fire is left to conjecture. The allegation is a bare statement of the fact of a contract, and nothing else. No principle is better settled in the law than that an allegation of duty alone is not sufficient. There must be an allegation of facts sufficient to create the duty or obligation, or else the declaration will be fatally defective. *Bailey v. Bussing*, 29 Conn. 1; *Hayden v. Smithville Manuf. Co.*, 29 id. 548; *McCune v. Norwich City Gas Co.*, 30 id. 521.

The second count is based upon a supposed duty which the defendants owed the plaintiffs to furnish them water for the extinguishment of their fires, growing out of a contract entered into between the Bridgeport Water Company and the city of Bridgeport, two years before the defendants were organized. How that contract became obligatory on the defendants is not stated; neither is it stated that it was an existing contract at the time of the fire. There are mutual stipulations to be performed in the contract by both of the contracting parties; and there is no allegation of performance by the city. And furthermore, by the terms of the contract, the Bridgeport Water Company bound itself only to furnish water for the extinguishment of fires at the hydrants which should be established by the city and the company, along their line of pipe, according to the terms of the contract. It is not alleged that there were any hydrants thus established, or that there was any hydrant in the vicinity of the fire. Neither is complaint made that water was not furnished at all the hydrants in that section of the city, if there were any. The ground of complaint is that water was not kept running through the pipes for the extinguishment of the fire. It is was an obligation which the Bridgeport Water Company never assumed, so far as it appears. We think this count is insufficient.

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The third and last count sets forth that the Bridgeport Water Company was incorporated by the legislature in 1853, for the purpose of supplying the city of Bridgeport with water for public and domestic use; that they were granted certain privileges by their charter, and were required to perform the terms and conditions stated in the proposition of Nathaniel Green, relative to supplying the city with water, and if they should fail to do so, then all the rights, powers and privileges conferred by the charter should cease and determine; that in the proposition referred to it was proposed that the Bridgeport Water Company should furnish fire hydrants in such places as the city government should direct, and should keep them in order and always supplied with water; that the exclusive right to the streets for the purpose of laying pipes should be granted to the company by the city, with certain limitations; that Green and his associates accepted the act of incorporation which was passed, and the Bridgeport Water Company was thereupon organized; that that company made the contract set out in the second count of the declaration with the city of Bridgeport; that the company introduced water into the city according to the terms of the contract and proposition; that afterward the company became insolvent, and the bondholders of the company became incorporated by an act of the legislature, under the name of the Bridgeport Hydraulic Company; that all the privileges and all the burdens of the old company were conferred and imposed on the new company; that the new company accepted their charter and assumed all the burdens and privileges of the old company; that certain hydrants were located near the place where the plaintiffs' property was situated; that before the fire these hydrants had been accepted by the city and by the last-named company; that the hydrants were located in suitable places to save the property of the plaintiffs, if supplied with water according to the terms of the proposition and contract; that it was the duty of the defendants to supply these hydrants with water; and that they negligently did not supply them with water at the time of the fire, but shut off the water in the pipes leading to the hydrants, and in consequence thereof the plaintiffs' property was destroyed.

These are the essential allegations of the count, and the question is, do they establish a cause of action against the defendants? It will be observed that the plaintiffs complain that the defendants did not supply with water the hydrants which had been established

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by the city and the Bridgeport Water Company under their contract, to enable the city through its fire department to perform a public duty which it owed to the plaintiffs and others, to extinguish their fires. Had the plaintiffs' fire been extinguished it would have been done by the fire department; for there is no allegation in the count that the plaintiffs had hose that might have been attached to the hydrants and the fire extinguished by their own efforts. Hence, whatever benefit the plaintiffs could have derived from the water would have come from the city through its fire department. The most that can be said is, that the defendants were under obligation to the city to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty.

We think it is clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim.

But there are other defects in this count. There is no allegation that the city ever accepted the proposition of Nathaniel Green. There is no allegation that the contract between the city and the Bridgeport Water Company was a subsisting contract at the time of the fire; nor that the city performed their part of the contract, nor that the city accepted the defendants in the place of the Bridgeport Water Company and confirmed the contract with defendants. There is an entire absence of allegations going to show a subsisting contract of the defendants with the city, much less with the plaintiffs, out of which a duty could arise.

We advise the Superior Court that the declaration is insufficient. In this opinion the other judges concurred.

NOTE BY THE REPORTER.—Precisely similar to the principal case were the case and decision in *Davis v. Clinton Water Works Co.*, Iowa Supreme Court, June 15, 1880. The court said :

"The only question presented in the case is this one : Is the defendant liable to the plaintiff upon the contract embodied in the ordinance ? The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom, by the protection of her property, in common with all other persons whose property is similarly situated, does not make her a party to the contract, or create a privity between her and defendant. It is a rule of law, familiar to the profession, that a privity of contract must exist between the parties to an action upon a contract. One whom the law regards as a stranger to the contract cannot maintain an action thereon. The rule is founded upon the plainest reasons. The contracting parties control all interests, and are entitled to all rights secured by the contract. If mere strangers may enforce the contract or actions, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions

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which would be brought thereon. Exceptions to this rule exist, which must not be regarded as abrogating the rule itself. Thus, if one, under a contract, received goods or property to which another, not a party to the contract, is entitled, he may maintain an action therefor. So the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder. In these cases the law implies a promise on the part of the one holding the money or property to account therefor to the beneficiary. Other exceptions to the rule, resting upon similar principles, may exist. See *National Bank of Grand Lodge*, 98 U. S. 123.

"The case before us is not an exception to the rule we have stated. The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she received just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulations, and the like. It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damages sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city and responsible alone to the city. The people must trust alone to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They cannot hold such officers and agents liable upon the contracts between them and the city. These views and conclusions are supported by the following authorities: *Atkinson v. Newcastle & Gateshead Water Co.*, L. R., 2 Exch. Div. 441; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; *Vrooman v. Turner*, 69 N. Y. 280; s. c., 25 Am. Rep. 195; Whart. on Neg., §§ 438, 439, 440; Shearm. & Redf. on Neg., § 54. The cases cited by counsel for plaintiff, we think, are not in conflict with the view we have above expressed."

In *Atkinson v. Newcastle & Gateshead Water Works Co.*, *supra*, the circumstances and the action were very similar to the principal case, except that the defendant's charter imposed a penalty for neglect. CAIRNS, L. C., said: "Now, in my judgment, the general scheme of these water-works clauses, and of any act in which they are incorporated, would appear to be this: A water-works company proposing to supply water to a town, apply to Parliament for powers to take certain springs and land, and to charge rates for the supply of water, in consideration of which powers being granted them they enter into certain obligations. Besides general obligations to supply the town commissioners with water for public purposes, they enter into certain special obligations as to fire-plugs, viz.: to keep the pipes connected with those charged with water at a certain pressure, and to allow all persons — not any particular persons or owners of particular houses, but *all* persons — at all times to take water for the purpose of extinguishing fire, without making compensation for it. The object for which the water is, in such case, to be used, is a public object, and to effect that object the company are willing to accept the obligation to allow any person to take any quantity of water gratuitously, and, further, to keep the pipes from which that water is to be taken charged at such a pressure that the water so taken may be most effectively employed.

"That this creates a statutory duty no one can dispute, but the question is whether the creation of that duty gives a right of action for damages to an individual, who, like the plaintiff, can aver that he had a house situate within the company's limits and near to one of their fire-plugs, that a fire broke out, that the pipes connected with the plug were not charged at the pressure required by the section, and that in consequence his house was burnt down. Now, *à priori*, it certainly appears a startling thing to say that a company undertaking to supply a town like Newcastle with water would not only be willing to be put under this parliamentary duty to supply gratuitously, for the purpose of extinguishing fire, an unlimited quantity of water at a certain pressure, and to be subjected to penalties for the non-performance of that duty, but would further be willing in their contract with Parliament to subject themselves to the liability to actions by any number of householders who might happen to have their houses burnt down in consequence; and it is, *à priori*, equally improbable that Parliament would think it a necessary or reasonable bargain to

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make. In the one case the undertakers would know beforehand what they had to meet as the consequence of their neglect, they would come under definite penalties; on the other they would virtually become gratuitous insurers of the safety from fire, so far as water is capable of producing that safety, of all the houses within the district over which their powers were to extend."

His lordship then examined the penalties in the statute, some of which were for the benefit of the public and others for the benefit of the water-rates payer, and continued:

"Apart, then, from authority, I should say, without hesitation, that it was no part of the scheme of this act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action; but that its scheme was, having laid down certain duties, to provide guaranties for the due fulfillment of them, and where convenient, to give the penalties, or some of them, to the persons injured, but where not convenient so to do, there simply to impose public penalties, not by way of compensation, but as a security to the public for the due performance of the duty. To split up the 43d section, and to say that in those cases in which a penalty is to go into the pocket of the individual injured there is to be no right of action, but that where no penalty is given to the individual there is to be a right of action, is to violate the ordinary rule of construction. There being here in a certain number of cases a penalty which the plaintiff himself admits excludes the right of action, the conclusion is irresistible that in the remaining cases also in the same section the legislature intended to give no right of action.

"Now, that would have been my opinion apart from authority. Is there then any authority which compels me to depart from that opinion? The only case which was cited to us in support of the plaintiff's contention was that of *Couch v. Steel*, 3 E. & B. 402. There a seaman of a merchant ship sued to recover damages for injuries sustained by him by reason of the omission of the defendant, a ship-owner, to provide proper medicines for the ship company. The declaration in that case was not framed upon any act of Parliament, but on the argument of the demurrer, one of the Merchant Shipping Acts was referred to as creating a duty in the ship-owner to provide certain medicines for the benefit of the crew, and the case was put very much as if there had been a parliamentary obligation to provide a great coat or some specific chattel for each particular member of the ship's crew. The same act which created the duty to provide the medicines imposed a penalty recoverable by a common informer for the omission to perform that duty; but it was there held, that notwithstanding the imposition of the penalty, an action lay at the suit of any one of the crew suffering special damage from such omission. With regard to that case, and the effect of that particular act, I will say this, that if the matter were brought before this court for review I should like to take time to consider whether, with reference to that particular act, that case was rightly decided. I will not go further than that, for it is unnecessary here to enter into that question, the act of Parliament under which the present action is brought being of a widely different character, and one which is open to observations which would not apply to the Merchant Shipping Act, which was before the court in *Couch v. Steel*. But I must venture, with great respect to the learned judges who decided that case, and particularly to Lord CAMPBELL, to express grave doubts whether the authorities cited by Lord CAMPBELL justify the broad general proposition that appears to have been there laid down — that wherever a statutory duty is created, any person, who can show that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend upon the purview of the particular statute, and the language which they have there employed, and more especially when, as here, the act with which the court have to deal is not an act of public or general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works. The case of *Couch v. Steel* therefore is no authority to regulate our decision in the present case. I am of opinion therefore that the declaration discloses no cause of action, and that the judgment of the Court of Exchequer must be reversed." COCKBURN, C. J., and BRETT, L. J., concurred.

It seems to us that *Couch v. Steel* is distinguishable on the ground that there the obligation was a general one, touching all the inhabitants of the realm, who should choose to "go down to the sea in ships," and not restricted to particular persons, or the residents of a particular place.

Nickerson v. Bridgeport Hydraulic Company.

Foster v. Lookout Water Co., 2 Lea, 42, was an action against a water company and a city, under circumstances similar to those of the principal case. The court said:

"This count, it will be noticed, does not set out the provisions of the charter of the city of Chattanooga nor the stipulations of the contract between the defendants, upon which their alleged duty is assumed to rest. It deals in conclusions or inferences, not in facts from which the court can draw its own conclusions. But conceding that it rests the liability of the defendants upon the charter of the city and the contract between them by sufficient averment of facts, the declaration, 'by a fair and natural construction,' shows that the mains, pipes and plugs were the property of the Lookout Water Company. The city only has a contract with the company, by which the latter is to furnish water in sufficient quantities to extinguish fires. The cause of action is in suffering these mains, pipes and plugs to get out of repair, and the mains and pipes to become filled with gravel and mud, so as to obstruct the flow of water. The duty of repairing and keeping open is *prima facie* in the owner of the property. The duty of the city, as the declaration states, is 'to use all means at its command' to prevent and extinguish fires. But the only means shown by the declaration to be at its command are the 'fire companies, fire engines, hose,' etc., under its control, and the water when supplied by the company. There is no averment that the city failed to use these means to the best advantage. And the general charges against the defendants are the inferences of the pleader from the facts. In this view, one cause of demurrer assigned on behalf of the city, that the declaration shows that the water company owned the pipes, etc., and does not show that the contract permitted the city to exercise any control over them, is well taken.

"One of the learned counsel of the plaintiff rests his client's right of recovery upon 'a tortious breach of contract,' meaning the contract with the city; the other, upon the unskillful and negligent performance of a duty imposed or authorized by its charter. If it be conceded that the declaration does show a stipulation in the contract between the company and the city, by which the company was to furnish water to extinguish fires, and a breach of that contract by negligently allowing its pipes to become obstructed, there is no averment that this stipulation of the contract was to inure to the benefit of any citizen aggrieved, or that the contract had been assigned to the plaintiff. The third cause of demurrer, that the declaration does not show that the plaintiff is a party, privy or assignee of the contract, is, therefore, so far as this aspect of the case is concerned, well taken.

"For another reason, even if the city itself were suing, there could be no recovery for the damages sought upon a breach of the supposed stipulation. By the law of this State, damages for breaches of contract are only those which are incidental to and directly caused by the breach, and may be reasonably supposed to have entered into the contemplation of the parties, and not speculative, accidental or consequential damages. The contract itself must give the measure of damages, and if it fails to do so, the damages can only be nominal. *State v. Ward*, 9 Heisk. 100, 132, and cases there cited. The stipulation in question, conceding it to be as claimed, was to furnish water in sufficient quantity to extinguish fires. The measure of damages for the breach of this stipulation, under the rule that the contract must give the measure, would be, at most, the value of the full quantity of water which ought to have been supplied at the time, not the accidental, speculative or consequential damages occasioned by a fire, which the company never stipulated to put out, nor *a fortiori*, of a fire which 'extended to' plaintiff's house.

"If we place the right of recovery upon the negligent performance of a duty, the difficulty will be to connect any duty arising out of the stipulations of the contract between the city and company with the plaintiff, and the particular loss sued for. The stipulation is to furnish water. The company has not stipulated to extinguish fires. It is not averred that the plaintiff had the means of using the water for the extinguishment of the fire. Hence, to use substantially the words of an eminent court, whatever benefit the plaintiff would have derived from the water would have come from the city through its fire department. The most that can be said is, that the company was under obligation to the city to supply the fire plugs with water; that the city owed a public duty to the plaintiff to extinguish the fire; that the fire plugs were not supplied with water, and so the city was unable to perform its duty. We think it clear that there was no contract relation between the plaintiff and the company, and consequently no duty which can be the basis of a legal claim. Per PARK, C. J., of Supreme Court of Connecticut, in *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 23.

Nickerson v. Bridgeport Hydraulic Company.

"Such a stipulation as the one in controversy cannot be construed as turning the water company into a public officer, or a contractor engaged to perform the duties of a public officer, who is liable in damages for negligence to any one sustaining special injury in consequence thereof. *Robinson v. Chamberlain*, 34 N. Y. 389. There is no such public office known to our laws as the supplying water for the extinguishment of fires.

"There are notoriously some branches of the law, the underlying principles of which are so unsteady, and the rights involved so complicated, that the courts must be content to deal with special cases as they arise. This is notoriously the case, as the judges of the highest court of the land have often had occasion to say, with the subject of State taxation in the matter of foreign and domestic commerce. The liability of a municipal corporation for certain classes of torts is another. 'All that can be done with safety is to determine each case as it arises.' Per FORT, J., in *Lloyd v. Mayor of N. Y.*, 1 Seld. 373. The inclination of the courts has been not to press the pecuniary liability of municipal corporations, which is distinctly recognized where the duty is a corporate one, absolute and perfect, and owing to an injured party, to cases where a duty is assumed not for the corporate benefit, but the common good. They have refused to hold a city liable for the acts of its police officers although they are appointed by it; or for the acts or negligence of its agents and employees in charge of patients in a public hospital; for the misconduct of the members of its fire department; or for the city's own neglect to provide suitable engines or fire apparatus, or to keep in repair public cisterns, or continue the supply of water to particular hydrants. *Dill on Mun. Corp.*, §§ 723, 774, 775; *Taintor v. Worcester*, 123 Mass. 311; s. c., 25 Am. Rep. 90; *Lansing v. Toolan*, 37 Mich. 152; *Wheeler v. Cincinnati*, 19 Ohio St. 19; s. c., 2 Am. Rep. 368. The reason is, that the hazard of pecuniary loss might prevent the corporation from assuming duties, which, although not strictly corporate nor essential to the corporate existence, largely subserve the public interest. The supplying water for the extinguishment of fires is precisely one of those acts which bring no profit to the corporation, but are eminently humanitarian. To hold a city responsible for the loss of a building, or of whole streets of houses, as sometimes happens, because it might be thought, or because in reality some of its indispensable agents had been negligent of their duty, might well frighten our municipal corporations from assuming the startling risk. Be this as it may, the present case, as made by the declaration, falls under no class of recognized liability."

"But public officers, such as postmasters, are liable in damages to individuals for the non-performance of their public duty. *Rowning v. Goodchild*, 2 W. Bl. 906. So of public contractors. *Robinson v. Chamberlain*, 34 N. Y. 389. So of public duties, not merely local, but in the performance of which all the inhabitants of the country may have an interest. For example, in *Mayor of Lyme Regis v. Henley*, 1 Bing. N. C. 222, where the crown granted a borough in fee farm to a corporation, on condition that they should repair the sea shore, etc., and an individual was injured by their neglect in that respect, held, that he could maintain an action. PARK, J., said: "We do not go the length of saying that a stranger can take advantage of an agreement between A and B., nor even of a charter granted by the king, where no matter of general and public concern is involved; but where that is the case, and the king, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals, peculiarly injured, by action." So, in *Couch v. Steel*, *supra*, stress was laid on the public nature of the duty. The court said, "the duty being one of a public nature, the defaulter would be subject by the common law to an indictment for a breach of it, except for the particular mode of punishment by a penalty prescribed by the act."

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HEDENBERG V. HEDENBERG.

(46 Conn. 80.)

Executors and administrators — foreign executor — liability in another State.

A foreign executor, who, after proof of the will at the place of the testator's domicile in another State, comes into Connecticut to reside, bringing with him a portion of the estate, cannot be made liable in Connecticut, at the suit of a creditor of the testator, even to the extent of the property so removed.

ASSUMPSIT for money had and received. The opinion states the point. The plaintiff had judgment below.

F. W. Perry and *G. Stoddard*, for defendant.

C. Thompson, contra. Movable property has no *situs* and it could not be brought here and administered under our law. An executrix cannot defeat creditors by moving thus from one State into another. 2 Williams on Exrs. 1745; *Tunstall v. Pollard*, 11 Leigh, 1; *Marcy v. Marcy*, 32 Conn. 308; *Nicole v. Mumford*, Kirby, 270.

LOOMIS, J. The important legal question in this case is, whether a foreign executrix, who after the testator's death and proof of his will at the place of his domicile in another State, comes into this State to reside, and brings with her a portion of the property belonging to the deceased, can be sued here in an action at law at the instance of a creditor and made liable to the extent of the property so removed?

The principles adopted by Chief Justice WILLIAMS in giving the opinion in *Holcomb v. Phelps*, 16 Conn. 127, as well as the preponderance of legal authorities elsewhere, will compel us to answer this question in the negative. We cite from the opinion on page 137. "The case of *Campbell v. Tousey, Executor of Booth*, 7 Cow. 64, was also relied on by the plaintiff. There the plaintiff having a debt against Booth's estate, sued Tousey as executor *de son tort*, and proved that he had assets in his hands in New York brought from Pennsylvania. The defendant proved that he was duly appointed executor of Booth, and found the will in that State, where

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the deceased lived. He also had received debts due to Booth in the State of New York, and he was held liable for all the assets brought into the State of New York which had not been applied in a due course of administration. The doctrine of this case, and similar decisions in Pennsylvania, is attacked by Judge STORY, who says 'there is very great difficulty in supporting these decisions, to the extent of making the foreign executor or administrator liable here, for assets received by him abroad in his representative character, and brought here by him. It will be found exceedingly difficult to cite any authority, at common law, in support of such a doctrine.' Story's Conf. of Laws, § 514. On the other hand, says this learned commentator, there are other American authorities which indicate a very different doctrine. The modern English authorities are to the same effect. They fully establish the doctrine that if a foreign executor or administrator brings or transmits property here, which he has received under the administration abroad, or if he is personally present, he is not either personally, or in his representative capacity, liable to a suit here; nor is such property liable here to creditors, but they must resort for satisfaction to the forum of the original administration."

Though the facts in the above case are not identical with those of the case we are considering, yet they are sufficiently alike to render the principles above mentioned applicable. In both cases the domicile of the testator and his property were in New York at the date of his death, and both the creditors and debtors of the estate then resided there, and the property was subsequently removed to this State. In the case cited the estate had been fully administered according to the laws of the State of New York, which furnished an independent ground of defense not applicable in the case at bar, but in the opinion the decision was placed, not upon this ground alone, but in part upon the general principles referred to.

The counsel for the plaintiff in the argument conceded that the general proposition of law as laid down by Judge STORY in his Conflict of Laws, cited in the above opinion, would prevent a recovery in this action, but he relied upon *Marcy v. Marcy*, 32 Conn. 308, as establishing for this State another doctrine. Judge BUTLER, in his able opinion in that case, did revise the definition of an executor *de son tort*, and vigorously controverted the proposition that an executor appointed and qualified in another State could be such a

stranger to the assets of his testator situated in this State as to become a wrongful intermeddler when he removed or collected them here without first taking out administration here, and he held that a foreign executor who comes into this State to collect debts or secure the property of his testator is liable to a creditor in this State to the extent of the assets so received. But we fail to discover any evidence of an intention to deny the doctrine of Judge STORY as cited by Judge WILLIAMS, or to approve the doctrine of *Campbell v. Tousey*. Indeed, as to the last case he says, on page 315, "it has been questioned on both the points involved in it, and is not now an authority in the State of New York, for the principles adopted in later cases are irreconcilable with it."

It is to be observed that one of the points in *Campbell v. Tousey* involved the identical doctrine on which the plaintiff relies for a recovery in this case. But it is further claimed in behalf of the plaintiff, that if we make an executor, appointed in another State, liable on account of assets collected here, we must logically advance the law so as to make him liable for all assets removed into this State. It seems to us there is a clear and reasonable ground for distinction between the two cases. In the present case the jurisdiction of the New York court had actually attached to all the property in question and was necessarily exclusive, and the executrix had become accountable for it in the foreign forum, while in the other case, though the executor in Massachusetts had such a title that his act of receiving the debts due here was not wrongful, yet the jurisdiction of the Massachusetts court had never actually and exclusively attached to the uncollected debts due here. It was still necessary in some way to invoke the aid of our own laws to recover the assets. Until actually recovered and fully administered under the law of the forum, a creditor here would have been entitled to ancillary administration, or as a substitute for that, he could bring a suit here against the executor and appropriate the property toward the payment of his debt.

In *Upton v. Hubbard*, 28 Conn. 285, Judge ELLSWORTH says:—"An executor gets such a title to chattels which are within the State of the decedent's domicile, that they can, in case of being stolen or lost, be reclaimed by the executor as his own property and in his own name. The domicile of a person in life, wherever he is, by a legal fiction draws the property to himself, so that he is said to be possessed of it there; but this is not true when the

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owner dies, having no longer any place of domicile. A statute representative does not universally succeed by legal operation to his title and possession, but as such he takes the property only which is within the State. If he is the principal representative, such as the principal executor or administrator, or is a legal assignee, and wishes to obtain the property which is abroad, he must go there, and by an ancillary administration or appointment get authority, or employ some one else to do so in his own name, and remit what he receives to the principal executor, etc. If indeed the principal executor or assignee go there himself, and without acquiring local authority, collects a debt or receives property belonging to the estate, it is well enough, we suppose, if the creditors or legatees there do not interpose and object; for in such a case the same end is accomplished which could be reached through an ancillary administration, and the law does not require any unnecessary formality and expense, but looks at the substance of the thing."

The above extract, while it contains a very clear statement of the law as it is accepted in this State, furnishes by suggestion a good ground for distinguishing as to the liability of a foreign executor, between a case where the assets are brought into this state after the death of the testator and proof of his will in another State, and a case where it is necessary to come into this State to secure them.

But the counsel for the plaintiff further suggests, that to deny a remedy in such a case as this will open a wide door for fraud and injustice, by enabling foreign executors who have not fully administered their estates to take the property and remove into another State in fraud or in defiance of the rights of creditors. While we confess that we do not like this aspect of the defendant's case, yet it is a pertinent suggestion in reply, to say that it is to be presumed that such laws are in force in New York as furnish a reasonable security to the parties in interest, and that the plaintiff by the use of due diligence and through the aid of legal process might in some form have had a remedy. And here we remark that the finding shows that after the will was proved both the plaintiff and defendant continued to reside for about two years in the place of the testator's domicile before the defendant removed any of the assets into this State; and the plaintiff continued to reside there some nine years longer before he came to this State to invoke the aid of our courts, having never, so far as appears, sought the aid of

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his own courts. It is possible, however, that this may be explained without imputing laches to the plaintiff.

[Omitting an unimportant consideration.]

In this opinion the other judges concurred.

PHOENIX MUTUAL LIFE INSURANCE CO. v. DUNHAM.

(46 Conn. 79.)

Insurance — life — effect of divorce on ownership of policy issued to wife on husband's life.

A husband procured the issue and delivery to his wife of a lawful policy on his life payable to her for her sole use, or in case of her death before his, to their children. Seven years later she procured a divorce from him. She always had the custody of the policy, but the husband paid all the premiums, except the last one before the divorce, which she paid. Afterward, without his knowledge, she surrendered the policy, and took a like paid-up policy. The husband died after her, and there were never any children. *Held*, that her representatives were entitled to the insurance.

BILL of interpleader on a claim for insurance moneys. On the 18th of January, 1867, Charles McCammon procured from the Phoenix Mutual Life Insurance Company, a policy of insurance on his life, for the sole and separate use of his wife, and payable to her on his death, and to their children in case of her death before his. The policy was delivered to and always held by her. He paid the premiums up to January 18, 1873, and she paid that of January 18, 1874. On the 15th of August, 1874, she procured a lawful divorce from him, and in October, 1874, she remarried Reynolds. On the 12th of January, 1875, without the knowledge or consent of McCammon, she surrendered the policy to the company and procured a paid-up policy, of like tenor, on which she paid the annual interest until January 12, 1877. The interest due on the latter date was paid by McCammon's executor, Babcock, December 29, 1876, and he received the renewal receipt. On the 10th of January, 1877, Mrs. Reynolds' husband and administrator tendered the amount due and demanded the renewal receipt from the company. Mrs. Reynolds died February 11, 1876, and McCammon died March 7, 1877. There was no issue of the marriage. The case was reserved.

E. Goodman, for petitioners.

C. E. Perkins, for Babcock. The question is, whether the estate of Charles McCammon, the insured, shall have the amount of the policy or whether it shall go to the second husband of Mrs. McCammon. It seems a little curious that McCammon should have been paying premiums on his own life for the benefit of his wife's second husband. Certainly no such intention existed in the minds of any of the parties to the contract. There is no reason or justice in it, and the court will not so hold unless obliged to do so by some very clear rule of law. The law, however, is clearly the other way. It is well settled that if McCammon insured his life, payable to his wife if she survived him, and she died before him, the policy would, by her death, become payable to him. *Conn. Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 205 ; *Chapin v. Fellowes*, 36 id. 132 ; s. c., 5 Am Rep. 49. It will not be denied that if I obtain insurance on my life, my estate can recover the amount even though the policy is not in terms payable to me or my representatives. If it is made payable to another *if he survives me*, and he dies before me, that clause becomes inoperative, and the policy is still payable to me as if that clause were not contained in it. This is only applying to policies the same rules of construction applicable to deeds, wills and other contracts. *Gambs v. Covenant Mut. Life Ins. Co.*, 15 Mo. 44 ; *Kerman v. Howard*, 23 Wis. 108 ; *Mut. Benefit Life Ins. Co. v. Atwood's Adm'x*, 24 Gratt. 497 ; s. c., 18 Am. Rep. 652. The object of these policies is to provide for the family of the deceased, and not for some other family. *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60 ; s. c., 19 Am. Rep. 530. The court held that the avails of such a policy, if not affected by any statute, are substantially to be disposed of like intestate estate of the insured. This is no doubt in accordance with the intent of McCammon when he obtained the policy and paid the premiums, and the law will "interpolate in the contract a provision" to that effect. It is held in all the cases where a debtor insures his life payable to a creditor, and pays the premiums, he is entitled to the policy if he pays the debt. *Court-enay v. Wright*, 2 Giff. 337 ; *Morland v. Isaac*, 20 Beav. 389. No principle can be better settled than that the avails of a policy *ought* to go to the person who applied for the policy and paid the premiums. The only cases where any exceptions are made to this rule are, where the policy is, by its terms, payable absolutely to some other

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person, or where by statute it goes to the surviving widow or children. The provision as to children is of no consequence, because there were none. The surrender of the policy by Mrs. Reynolds and her husband, and the reissue of a paid-up policy, without the knowledge or consent of McCammon, cannot change the rights of the parties. *Chapin v. Fellows*, 36 Conn. 132; s. c., 5 Am. Rep. 49; *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294; *Norwood v. Guerdon*, 60 Ill. 253.

H. C. Robinson, for Dunham.

PARDEE, J. The petitioners' charter, granted in 1851 (3 Private Acts, 611), provides "that policies of insurance issued by said company on the life of any person, expressed to be for the benefit of a married woman, whether the same be effected by herself or her husband, or by any other person in her behalf, shall inure to her separate use and benefit, and that of her and her husband's children, if any, as may be expressed in said policies, independently of her husband and his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives."

By virtue of this provision the husband is enabled to make in a specified manner a lawful gift to his wife, for her sole and separate use and benefit, irrespective of the claims of his creditors. Mr. McCammon bought of the petitioners their agreement to pay at his death a fixed sum to and for the sole use and benefit of his wife, and delivered the policy to her. There was then a valid contract between herself and the company; she held a chose in action, subject to the principles governing other agreements involving pecuniary obligations. If the amount expressed in the policy had been made payable to her without condition, she would at once have become the owner of a valuable property, which she was permitted, both by the special law and the declaration of the husband, to hold independently of him; of an interest which she could sell or assign, either absolutely or by way of security; one which, upon her death, would pass to her legal representatives as would any other sole and separate estate. It is true that the gift to Mrs. McCammon was made subject to a condition subsequent; if issue had survived, the amount would have been payable to such issue; but as no child was ever born to either of them, the condition became void, and

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may be laid out of consideration. Holding, then, the first policy as of her sole and separate property, she had the right to exchange it for the second. For this last she paid the entire consideration and the annual premium save one. Thus she purchased insurance upon Mr. McCammon's life solely for her own benefit, and paid for it from her separate estate. And although it is true that upon a change of purpose he could have made the gift of the first policy valueless, so far as his own action was concerned, by omitting to pay the annual premiums necessary to keep it in force, it is difficult to perceive upon what principle his legal representatives can now retract and resume in behalf of his estate a valid gift made by him to his wife. It is suggested in argument that it is a strange conclusion of law that the first husband should pay money of which the second should have the benefit. But to this possibility all gifts from husbands to and for the sole and separate use of wives are exposed ; the marriage tie is dissoluble by death or divorce ; neither the dying nor the divorced husband can control the ultimate destination of the sole estate of the surviving or separated wife.

In *Conn. Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305, the policy was in favor of one Mrs. Kendall ; she pledged it for borrowed money, and died ; her husband died four days later ; a child survived them. The contest was between that child and the pledgee. It was determined that by the terms of the policy the mother's interest ceased, and that of the child, which was before contingent, became fixed and certain by the death of the mother before that of the father, and that the mother could not by the pledge defeat the right of the child. In *Chapin v. Fellowes*, 36 Conn. 132 ; s. c., 5 Am. Rep. 49, the mother died, her husband and child surviving. After her death he surrendered the policy, took out another for the same amount in his own name and for his sole benefit, and within two years died insolvent, leaving children. The contest was between his creditors and his children for the fund. It was held that, upon the death of the mother previous to that of the husband, the policy, by its terms, immediately became payable to the children, and was so payable at the death of the father. In *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60 ; s. c., 19 Am. Rep. 530, the wife died, husband and children surviving ; one of the children died, leaving a child ; subsequently the husband died. The effort was to exclude this grandchild from participating in the fund. It was decided that a transmissible interest vested in the

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children upon the issuing of the policy, and that the grandchild took by descent the interest of the parent.

The policy in each of these cases contained the proviso in behalf of the children, and in each case children survived. The respective wives had received conditional gifts. At no moment was either of them in a position to deal with her policy as its absolute owner. In each case an event occurred which put an end to any interest in her or in her estate in the fund. In each case the duty of the court was to enforce the proviso in favor of children, and whatever is said in either of them as to the nature or extent of the interest of the wife in her policy, is to be understood as said of it in instances where there are children, and not as determining, where a policy is made payable without condition to the sole and separate use of the wife, in instances where there are no children, that she takes no interest unless she survives her husband.

The Superior Court is advised that the amount due upon the policy should be paid to the representative of the estate of Lydia S. Reynolds; the payment by Charles McCammon of \$24.50 on December 29, 1876, on the policy, with interest thereon, to be deducted and paid to the representative of his estate.

Interest deducted.

In this opinion the other judges concurred.

JARVIS V. WILSON.

(46 Conn. 90.)

Negotiable instruments — bill of exchange — order — oral acceptance — defenses of no funds.

An order by A. on B. to pay to C. and charge to A. is a bill of exchange; * may be accepted orally; and the acceptor cannot defend by reason of want of funds of the drawer in his hands.

ASSUMPSIT. The opinion states the facts. The plaintiff had judgment below.

* See *Corbett v. Clark* (45 Wis. 403), 30 Am. Rep. 768.

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C. E. Perkins and *S. F. Jones*, for plaintiff in error.

M. R. West, for defendant in error.

LOOMIS, J. On the 8th of July, 1874, one William Murphy owed the plaintiff \$189.20, and drew his order on the defendant in favor of the plaintiff in writing as follows :

"Mr. A. M. Wilson. Please pay Joseph Jarvis one hundred and eighty-nine dollars and twenty cents, and charge the same to me.
WILLIAM MURPHY."

Murphy, who was then and had been for sometime in the employ of the defendant, had been authorized by the latter to draw orders in favor of his workmen, of whom the defendant knew the plaintiff to be one.

The above order was duly presented for acceptance to the defendant on the same day that it was given, and the defendant said it was good, and verbally promised to pay it. It afterward appeared that there was in fact due from the defendant to the drawer only \$144.94, and thereupon the defendant refused to pay the plaintiff as he had before agreed. The court below upon these facts held the defendant liable for the full amount of the order. We think the judgment must stand against all the objections urged in behalf of the defendant.

The defendant claims, *in limine*, that his undertaking cannot be regarded as subject to the rules applicable to bills of exchange, but must be treated as a mere promise to pay money. But we do not see why it does not contain every essential element of the most approved definition of a bill of exchange. It is a written order from Murphy, addressed to the defendant, requesting him to pay the plaintiff a certain sum of money therein named. 1 Bouv. Law Dict., *Bill of Exchange*; Byles on Bills, 57; Story on Bills, §§ 3, 37, 40; Edwards on Bills and Notes, 150; *Eastern R. R. Co. v. Benedict*, 15 Gray, 292; *Kendall v. Galvin*, 15 Me. 131; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 12.

But conceding the order to be a bill of exchange, the defendant further claims that he is not liable, because his acceptance was only by parol, when it should have been in writing.

It is true, as a general rule, that to make one liable as a party to a bill or note his name should appear thereon under his own hand

or that of his agent. A wise policy may also require that the liability of an acceptor should not depend on parol evidence, and recognizing this, some States have already changed the rule of the common law as to an acceptor of a bill of exchange. In New York it is required by statute that the acceptance should be in writing, and there is a similar statute in England as applicable to an inland bill. But where there is no statute to control, the rule is quite general, both in England and in the United States, that an acceptance of a bill of exchange may be by parol. 1 Swift's Dig. 424; Story on Bills, §§ 242, 243, 246; 1 Pars. on Cont. 267; Edwards on Bills and Notes, 409; *Dunovan v. Flynn*, 118 Mass. 539; *Spaulding v. Andrews*, 48 Penn. St. 411.

The statute of frauds does not apply to such an undertaking. One reason may be that the acceptor is regarded as the primary debtor, and his acceptance is an undertaking not merely to pay a debt due from the drawer to the payee, but to pay his own debt to the drawer.

But in this case the defendant relies on the fact that when he accepted the bill he had not in his hands sufficient funds of the drawer to pay the amount required, and contends that the acceptance should therefore either be considered within the statute, or should be held void for want of consideration. This objection ignores the fundamental principle that the acceptance admits every thing essential to the validity of the bill, and that want or failure of consideration cannot be shown in a suit by the payee against the acceptor. The presumption is that every bill of exchange is drawn on account of some indebtedness from the drawee to the drawer, and that the acceptance is an appropriation of the funds of the latter in the hands of the former. The rule of law is not unjust that prevents the acceptor from showing as a defense against a suit by the payee a want of funds of the drawer in his hands, for it was his duty to ascertain before he accepted the bill whether he owed the drawer that amount. This was exclusively within his knowledge, but the plaintiff had no means of knowing how the fact was, and he had a right to assume that the defendant would not accept the bill unless he had funds of the drawer sufficient to make good the acceptance. *Fisher v. Beckwith*, 19 Vt. 31; *Arnold v. Sprague*, 34 id. 402; *U. S. v. Bank of Metropolis*, 15 Pet. 377; *Grant v. Ellicott*, 7 Wend. 227; *Hoffman*

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v. *Bank of Milwaukee*, 12 Wall. 181 ; Pars. on Notes and Bills, §23, 1 Dan. on Neg. Inst. 135.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

HODGDON V. NEW HAVEN AND HARTFORD RAILROAD CO.

(46 Conn. 270.)

Carrier — delivery at port — demurrage — detention by ice.

A contract to deliver freight at a port implies at a wharf or other convenient or customary place of discharge, and where a master was unable to bring his vessel to any wharf for several days on account of ice, *held*, that he was not entitled to demurrage for such delay, although he notified the consignee, and although the consignee made a way through the ice for another vessel.

ASSUMPSIT for demurrage. The case is stated in the opinion. The defendants had judgment below.

R. S. Pickett, for plaintiff, cited *Abbott on Shipping*, 311; *Parsons on Shipping*, 314; *Haaman v. Gaudolph*, 1 Holt's N. P. 35, 38; *Randall v. Lynch*, 2 Camp. 352, 355; *Philadelphia & Reading R. Co. v. Northam*, 2 Benedict, 1, 5; *Keen v. Audenreid*, 5 id. 535; *Lake v. Hurd*, 38 Conn. 536.

G. H. Watrous, contra.

PARDEE, J. This is an action of assumpsit for demurrage.

On or about December 14th, 1876, the plaintiff received on board of a vessel at Baltimore a cargo of coal consigned to the defendants at New Haven, at which port he reported himself on the 24th of December, and asked for a berth in which to discharge; but he did not come to any dock, for the reason that the ice was so thick that he could reach no wharf in the harbor unless through openings made by steam tugs or otherwise, before the 19th of January, 1877. Between these dates the defendants daily broke a passage through which they towed vessels to and from their own docks.

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On the day of the plaintiff's arrival they opened a passage and towed through it vessels loaded with coal consigned to themselves which had arrived prior to that day; and when his turn came they opened a passage for and towed his vessel to their dock. The ice delayed him four days, and for this he demands damages. The defendants had a judgment.

Passing the question made as to the power of the person signing the bill of lading, and assuming for the purposes of the case that the defendants were bound by his act, still the plaintiff is not entitled to a judgment. He undertook to deliver the coal at the port of New Haven; and twenty-four hours after his arrival at that port and notice thereof to the defendants, they were to have for the reception of the cargo, one day for every hundred tons thereof; after which they were to pay demurrage.

Upon notice to the defendants of the arrival of the plaintiff's vessel at New Haven it was their duty to be ready to receive the coal, or designate some wharf or other proper place where it could be deposited in a reasonable time. They failing in this duty, it was the right of the plaintiff to treat the contract as broken, and deposit the coal at the usual place, if there was any such, or procure one at their expense. The contract to deliver at the port of New Haven implies more than bringing the vessel into water within a line drawn across the mouth of the harbor; in the absence of any special provision and of any custom to discharge into lighters, it imports that the carrier is to bring his vessel to some wharf, or convenient or customary place of discharge, where he can deliver and the consignees can receive the cargo, according to the usage of the port. In the case before us the plaintiff was barred by the frost from every wharf or landing place which the defendants could designate or he could select; he could not deliver the coal upon land; the contract did not oblige them to go upon the ice to receive it; in fact his progress was arrested before he had brought his voyage to the contract termination, and that by no fault of theirs; it was a misfortune which the law must leave where it falls.

As the defendants did not contract to protect the plaintiff against the action of frost, they owed him no duty in respect to it. If for any reason they chose to open a way for the passage of another vessel the contract relation between themselves and the plaintiff was not thereby changed; he acquired no right to the way thus made; such other vessel having gained prior access to and occupied

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it, as a matter of law it did not exist so far as the plaintiff is concerned.

In *Parker v. Winlow*, 7 Ell. & Black. 940, the tides were neap when the vessel approached the designated wharf, and she ran upon the sand and lay there during some days until the tides were higher. Lord CAMPBELL, C. J., said: "If when the ship got fixed upon the mud bank the master had given notice that he was ready to discharge there, it might have been open to him to show that it was the duty of the other party to take the cargo there, and if he could have shown such to be their duty, the lay days would have commenced. But no such notice was given; there was no suggestion of any custom requiring the consignees to procure lighters; and both sides acted as if they did not contemplate any unloading until the vessel got up to the wharf." In *McIntosh v. Sinclair*, 11 Ir. Rep., Com. Law Series, 456, PALLES, C. B., said: "The obligation of the ship-owner under the charterparty is not alone to carry the cargo to the port of destination, but in addition to deliver it according to the usage of the port. His duty is not discharged simply by arrival at the port or at the usual place of discharge within the port." In *Aylward v. Smith*, 2 Low. Dec. 192 (District Court of Massachusetts, affirmed by the Circuit Court), the libellant's vessel came to the respondent's wharf on the 20th of December at high tide and was made fast outside of another vessel which was in the berth. This last was hauled out on the next day; but the libellant's vessel was then aground and so remained; afterward the ice made round her and she could not be hauled in for several days. LOWELL, J., said: "The plaintiff says that he arrived at the wharf on the 20th of December and reported to the defendant and ended his voyage. This argument is specious; but it assumes that the vessel had arrived at the dock or wharf, when in truth she had only very nearly arrived. It has been held in two English cases concerning cargoes of coals shipped under contracts almost identical with this, that delays within the port for a considerable time, owing to a want of sufficient water at the place of delivery, would not require the freighter to receive the coals at another place, or cause the lay days to begin, though the contract had the clause that the ship was to go only so near to the place as she could safely get. It was held that although she could not safely go up while the tides were neap, yet that was one of the accidents of navigation which a vessel contracting to go to a tidal harbor ran the risk

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of. The distance at which the ship is kept from her berth by the low water is immaterial, if it be so far that the delivery of the cargo is prevented."

We do not advise a new trial.

In this opinion the other judges concurred.

MITCHELL V. WHEATON.

(46 Conn. 315.)

Accord and satisfaction—acceptance of less sum for greater—payment of costs.

In an action on a liquidated debt of \$299, the creditor orally agreed to accept \$150 in full if the debtor paid the costs, and received the \$150. The debtor subsequently paid the costs. *Held*, a good accord and satisfaction.

ASSUMPSIT. Case reserved. The opinion states the facts.

S. Lucas and M. A. Shumway, for plaintiffs.

T. E. Graves, for defendant.

PARK, C. J. The plaintiffs brought the present suit to recover the sum of \$299.48 for goods sold and delivered to the defendant. While the suit was pending the parties came to a settlement in the State of New York, in which it was agreed that the defendant should pay the plaintiffs the sum of \$150, and the costs and expenses of the suit when the same should be ascertained, and the plaintiffs agreed to accept this payment in full satisfaction and discharge of their claim. The defendant paid the \$150, and took from the plaintiffs the following receipt: "New York, January 8th, 1876. Received from Henry A. Wheaton one hundred and fifty dollars, to be in full of our account against him when the costs and expenses in suit by us against him are paid." On the day following this transaction the costs and expenses of the suit were found to be the sum of eighteen dollars, which the defendant tendered to the plaintiffs, and subsequently paid to their attorney in the suit, who was authorized to receive it.

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On the trial in the court below the defendant pleaded the accord and satisfaction in bar of the plaintiffs' cause of action. The plaintiffs' replication set forth fraud on the part of the defendant, by means of which he induced the plaintiffs to settle and discharge their claim; and issue was joined on the question of fraud thus raised by the pleadings. The court found the issue in favor of the defendant; and the plaintiffs thereupon prayed for judgment notwithstanding the finding, on the ground that a less sum of money than the whole debt could not be received in full satisfaction and discharge of the debt. The court reserved the question for the advice of this court, whether upon these facts there was a discharge of the plaintiffs' cause of action.

The plaintiffs contend that the sum of one hundred and fifty dollars cannot be an accord and satisfaction for a debt of two hundred and ninety-nine dollars, when this last amount is found to be a debt agreed on and liquidated between the parties, on the ground that there was no consideration for giving up the remainder. The principle of law sought to be applied by the plaintiffs has been long established and is well settled; still very little reason can be given for it, and courts have always been ready to avoid applying it when any additional collateral consideration has appeared, upon which a technical distinction could be founded. The court in Massachusetts in the case of *Brooks v. White*, 2. Metc. 283, thus comments on the principle: "The foundation of the rule seems therefore to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate with legal impunity his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever the technical reason for its application does not exist, the rule itself is not to be applied." The court in New York in the case of *Kellogg v. Richards*, 14 Wend. 116, thus speaks of it; "The rule that the payment of a less sum of money, through agreed to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical and not very well supported in reason. Courts therefore have departed from it on slight distinctions." And the court held that the giving and receiving of the note of a third person in full satisfaction and discharge of a greater sum was a valid discharge. The same doc-

trine was held in *Boyd v. Hitchcock*, 20 Johns. 76; 11 Am. Dec. 247. It is said in Coke Litt., 212 b, that "if the obligor pay the lesser sum, either before the day or at another place than is limited by the condition, and the obligor receiveth it, this is a good satisfaction." The same doctrine may be found in *Warren v. Skinner*, 20 Conn. 559. These cases, and many others that might be cited, show how a slight additional consideration to the payment of a less sum of money for a greater sum may work a discharge of the entire claim.

Let us apply this doctrine to the case we have in hand. We have here a consideration additional to the payment of the \$150 by the defendant. The defendant agreed to pay, and did afterward pay, the costs and expenses of the plaintiff's suit. The costs of the pending suit the defendant did not at the time owe the plaintiffs, and it was not certain that he ever would. That would depend upon the result of the suit. At all events, the plaintiffs had no claim whatever against him for the costs of the suit when the settlement was made, and this brings the case within the doctrine of the cases referred to.

But the defendant not only paid the costs of the suit, but the expenses also. Those expenses embraced the amount which the plaintiffs owed their attorney for his services in the case, and which never could have been recovered of the defendant.

We think it is clear there was consideration sufficient for a valid accord and satisfaction.

The defendant's plea in bar is not technically an accord and satisfaction, because it does not allege that the plaintiffs received the \$18 tendered to them as the costs and expenses of the then pending suit, but inasmuch as they prayed for judgment under all the circumstances of the case after the court had found the issue against them, they must take the fact that they received the amount before trial as found by the court. It is true, they claimed to have received it on account, but it was tendered as the costs and expenses, and they must have received it as such if they received it at all.

We advise judgment for the defendant.

Judgment for defendant.

In this opinion CARPENTER, PARDEE and GRANGER, JJ., concurred. LOOMIS, J., was of opinion that the matter set up in the defendant's plea did not amount to an accord and satisfaction, but simply to a receipt in full pleaded in bar. He however concurred

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in the result because the plaintiffs' replication to the plea raised an issue of fact, namely, that the receipt was obtained by fraud, which issue was determined substantially by the finding of the court against the plaintiffs.

STATE V. WORDEN.

(46 Conn. 349.)

Constitutional law — statute authorizing prisoner to elect to be tried by court.

A statute providing that in criminal prosecutions the accused may elect to be tried by the court instead of a jury, and giving the court power in such cases to try the cases and render judgment, is constitutional, and such election will bind the accused.*

CONVICTION of rape. The opinion states the facts.

D. B. Lockwood and *A. H. Averill*, for plaintiff in error. The statute authorizing the prisoner to elect to be tried by the court instead of the jury contravenes the provisions of article 1, sections 9 and 21, of our State Constitution.

1. The crime charged, whether rape or carnal abuse, was a felony at the time of the adoption of the Constitution in 1818. 2 Bish. on Crim. Law, § 1133. Such a crime was triable only by a jury; and it was incompetent for the legislature, under the Constitution, to provide for the trial of such a crime without a jury. Sedg. Const. Law, 482, 496; 2 Swift's Dig. 403; 4 Bl. Com. 349, 350; 1 Chit. Crim. Law, 522; *Stokes v. People*, 53 N. Y. 171; s. c., 13 Am. Rep. 492; *Vose v. Cockcroft*, 44 N. Y. 422; *Emerick v. Harris*, 1 Binn. 424; *Francis v. Baker*, 2 R. I. 103; *Guile v. Brown*, 38 Conn. 242.

2. In capital and other felonies the accused cannot waive his right to a trial by the common-law jury. The State has an interest in the preservation of the liberty of its citizens, and will not allow it to be taken away except by due process of law. Story on Const., § 1780; 4 Bl. Com. 349; Sedgw. on Const. Law, 474, 494 and note;

* See *State v. Kaufman*, post. See, also, note, 1 Cr. Law Mag. 196.

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Cooley on Const. Lim. 319, 351, 354 and note 2; 1 Benn. & Heard's Lead. Crim. Cases, 492, 496; *Cancemi v. People*, 18 N. Y. 128; *Maurer v. People*, 43 id. 1, 4; *Grant v. People*, 4 Park. C. C. 534; *Brimmingstool v. People*, 1 Mich. N. P. 260; *People v. Smith*, 9 Mich. 193; *Hill v. People*, 16 id. 357; *Underwood v. People*, 32 id. 1; s. c., 20 Am. Rep. 633; *Wilson v. State*, 16 Ark. 601; *Portland v. Bangor*, 65 Me. 120; s. c., 20 Am. Rep. 681; *Morse v. Home Ins. Co.*, 13 Am. Rep. 297, note; *Brown v. State*, 8 Blackf. 561; *Brown v. State*, 16 Ind. 496; *Bond v. State*, 17 Ark. 290; *Work v. State*, 2 Ohio St. 296; *Williams v. State*, 12 id. 622; *Goddard v. State*, 12 Conn. 448, 454; *State v. Maine*, 27 id. 281.

J. H. Olmstead, State's attorney, for the State.

CARPENTER, J. The prisoner was indicted, tried, and convicted of the crime of rape upon a female under ten years of age. The trial, at the prisoner's request, was by the court instead of the jury. The prisoner moved in arrest of judgment on two grounds: 1st, that under our statute the crime of rape cannot be committed upon a child under ten years of age; and 2d, that the statute authorizing him to elect to be tried by the court was unconstitutional and void. The Superior Court overruled the motion in arrest, and the prisoner brings the case before this court by a motion in error.

[Omitting first ground.]

Second. The statute of 1874, which was in force when this case was tried, now repealed, provides that "in all criminal causes, prosecutions and proceedings, the party accused may, if he shall so elect, when called upon to plead, be tried by the court instead of by the jury; and in such cases the court shall have full power to hear and try said cause, and render judgment and sentence thereon."

It is now claimed that that statute is in conflict with the Constitution.

There are two clauses, both found in the "Declaration of Rights," which bear upon this subject. The first is found in the 9th section, and clearly refers to the personal rights of a person accused of crime, and secures to him "a speedy public trial by an impartial jury." As this section is not much relied on we pass to consider the 21st section, which reads, "The right of trial by jury shall remain inviolate."

Compared with this language the statute would seem to be in perfect harmony with it. The right to a jury trial remained to

the prisoner. He was not deprived of it, but voluntarily relinquished it.

But it is urged in behalf of the prisoner that the word "right" has a much broader meaning than is ordinarily attached to it, and includes the faculty or privilege which individuals have as persons, as citizens, and as members of the body politic, to demand of the government, acting through all its branches, that certain principles of governmental administration essential to the liberty and welfare of the people shall not be violated ; that in this sense it is mainly political, and the interest in its maintenance purely personal to the individual is so interwoven with the interest of the citizens and the body politic that its surrender is placed beyond the power of the individual.

No one by simply reading this section would suppose that the framers of the Constitution intended by it to secure a principle of government or the political rights of the people collectively or individually. The natural and obvious meaning is to secure to suitors and persons accused of crime, as individuals, the right and privilege of having their causes heard and determined by a jury ; and it is difficult to see how the principles of liberty and self-government, or the interests of the body politic, can in any way be put in jeopardy by a waiver of that right. That clause of the Constitution applies to civil as well as criminal causes. The trial by jury in civil causes has been waived for many years, and now a large portion of such causes involving issues of fact are tried by the court ; and yet the State does not seem to have suffered any detriment. Aside from questions of public policy, which we will consider presently, we see as little reason for apprehending trouble from the trial of criminal causes by the court.

It is further contended that the word *right*, as used in the section under discussion, is synonymous with *law*. This argument is drawn from the fact that the Latin word *jus*, which is ordinarily translated "right" is sometimes translated "law." Thus the *jus gentium* is the law of nations. But the word "right" is seldom used in the sense of law. We must give to it its primary and natural meaning, unless there is something which clearly indicates that it is used in a different sense.

Let us substitute the word "law" for "right." "The law of trial by jury shall remain inviolate." What is its meaning ? Two constructions and two only seem possible. First, we may construe the

word "law" as meaning "right"; and that brings us precisely where we are now, and limits the word substantially to the individual rights of parties. If that interpretation prevails, it is manifest that the prisoner gains nothing by the substitution.

The only other reasonable construction is to give the word its ordinary meaning. The effect of that would be to give the then existing statutes authorizing and regulating trials by jury the force of a constitutional provision. The absurdity of such a construction will be apparent when we consider that prior to the adoption of the Constitution those laws were frequently changed. Indeed the institution itself, of trial by jury, from its first existence to the present time, has barely preserved its own identity. As it existed when our Constitution was adopted, and as it is now, it is not the product of any one generation or of any one age; but it is the growth of centuries, changing and improving with time and experience. It cannot be possible that the Constitution intended to attach itself to the statute laws then in force and make them unchangeable. It aims rather to place the right beyond the power of the legislature to abridge it, and at the same time to leave it in the power of legislation to improve it and adapt it from time to time to the ever-changing phases of human affairs.

If it be attempted to give the word "law" a more indefinite meaning, and interpret this clause as intended to perpetuate the institution or system of jury trials, the same difficulties will be encountered, for the institution existed by statute and by the common law founded on statutes originally. As such it was liable to modification, if not to repeal. It is true the institution was so thoroughly imbedded in the British Constitution that it came to be regarded as the birthright of every Englishman, and as such was carefully watched and preserved unimpaired through all changes and even revolutions. The very fact that it was so jealously guarded shows that it was not absolutely irrepealable. Moreover it was regarded as the personal right of every one to have his cause tried, or to be tried himself if accused of crime, by a jury; so that the word "right" in its ordinary sense expresses the idea more clearly and forcibly than any other, and in that sense alone we think it was used.

It is further claimed that the right of trial by jury covers not only the personal privilege of a single suitor or accused person, but also the interests of jurors, judges and all citizens, in benefits direct

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and indirect, which the framers of the Constitution believed to be involved in the institution of trial by jury.

The interests, feelings and desires of judges and jurors as such we pass by, simply remarking that probably the framers of the Constitution did not deem them of sufficient importance to make them even remotely or incidentally the subject of a constitutional provision. In respect to the interests of the public at large it is quite different. Those interests might with propriety perhaps have been protected had it been considered desirable. If such had been the intention we should expect to find somewhere in the Constitution language adapted to that end. We should expect, too, that they would deal with that purpose directly and explicitly. Hence it would not have been left in doubt, nor would it have been hidden in a provision apparently designed to secure personal rights of individuals. We find in the Constitution of the United States, which was in force when our Constitution was framed, the explicit provision, "The trial of all crimes, except in cases of impeachment, shall be by jury." It would have been easy for our convention to be equally explicit. The fact that the interests of the public in this regard were not expressly provided for furnishes a strong presumption that it was not intended to place the matter beyond legislative control. With the Constitution of the United States before the convention, the omission is significant.

Another ground on which the validity of this statute is questioned is, that it is contrary to public policy.

That the law is impolitic and unwise, especially in its application to capital cases and felonies generally, we are ready to concede to the fullest extent. We cannot believe that it is wise or expedient to place the life or liberty of any person accused of crime, even by his own consent, at the disposal of any one man or two men, so long as man is a fallible being. But that is a question for the legislature, and the legislature has reconsidered the matter, and very properly repealed the obnoxious law. We are dealing, not with a question of expediency, but with one of constitutional power. The judiciary has power to declare a statute void for unconstitutionality, and will exercise that power only in clear cases. But we know of no principle of jurisprudence that will justify the court in avoiding a statute on the ground that it is contrary to sound policy. Such a decision would manifestly be an encroachment upon the domain of legislation. We may properly have regard to

questions of policy and expediency in applying the principles of the common law, but with the policy or impolicy of a plain statute we have nothing to do. We have no provision in our Constitution prohibiting the legislature from violating principles of sound policy by passing unwise laws.

A brief reference to some of the decisions cited in the argument will close this discussion.

In our own State it was held that, inasmuch as there was no statute conferring upon the Superior Court the power to try a criminal charge except through the intervention of a jury, that court without a jury had no power to try it. *State v. Maine*, 27 Conn. 281. Courts elsewhere have held the same doctrine, and to such an extent that it may now be regarded as the established law. The reason is obvious; the law has provided only one tribunal to try criminal causes—the court *and* jury. The Superior Court *without* a jury, in respect to criminal causes, was unknown to the law. Crime in a free, civilized country ought never to be punished except through the intervention of the legally constituted tribunals. But as the statute we are now considering expressly authorizes the Superior Court to try criminal charges, those decisions are inapplicable.

There are decisions in which it is held, especially in capital cases, that it is incompetent for the prisoner to waive the constitutional and statutory jury of twelve men. *Cuncemi v. People*, 18 N. Y. 128, and cases following that decision. They hold, in effect, that the absence or disqualification of one or more of the panel cannot be waived, and that a verdict by a jury of less than twelve is not a verdict by a legal jury. In capital cases, in favor of life, the law will not allow the prisoner to agree to be tried by less than twelve jurors, as that would be in effect to substitute another tribunal for that established by the Constitution and laws—a species of arbitration. Those cases are unlike this. In them the question was whether a man could lawfully be tried by a tribunal not known or recognized by law. In this case the question is, whether it is competent for the legislature to provide two tribunals, and authorize the trial of the prisoner by one or the other at his election. If a statute should authorize the trial of a prisoner, with his consent, by eleven jurors, that would present a case more analogous to this.

But in cases not capital it has been held that the disqualification of a juror may be waived, and that by consent a verdict may be

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rendered by eleven jurors. *Commonwealth v. Daily*, 12 Cush. 80, was a prosecution for a misdemeanor. During the trial one juror was withdrawn, and, by consent entered of record, the trial proceeded before eleven jurors. The verdict was sustained, mainly on the ground that the defendant, having waived the objection and taken the chances of a favorable verdict, was precluded from taking the exception after verdict. The case of *State v. Tuller*, 34 Conn. 280, was a prosecution for embezzlement. After the jury retired, and before rendering their verdict, it came to the knowledge of the defendant's counsel that a juror had, before the trial, formed and expressed the opinion that the defendant was guilty. This was not brought to the attention of the court until after the verdict was rendered. It was held that the disqualification was waived, and judgment was rendered on the verdict. There are other similar cases, but it is unnecessary to refer to them.

In Ohio, a statute defining the jurisdiction and regulating the practice of probate courts, which provides that upon a plea other than the plea of guilty, if the defendant do not demand a trial by jury, the probate judge shall proceed to try the issue, was held to be no infringement of the Constitution. *Daily v. State*, 4 Ohio St. 57; *Dillingham v. State*, 5 id. 280. *Ward v. People*, 30 Mich. 116, is to the same effect.

We find no case in which it is held that the legislature has no power to provide for the trial of criminal causes by the court; while statutes applying to misdemeanors have been held valid where the right to a jury trial remained. In respect to this question of constitutional power we know of no distinction between capital offenses and others — between felonies and misdemeanors.

In respect to the question of waiver in its application to a single juror, courts have distinguished between the higher and lower grades of crime. In its application to a jury trial altogether they have held that there can be no waiver in any case unless authorized by statute, and unless the statute has conferred jurisdiction upon the court. But under the Constitution all crimes are upon the same footing in respect to the forum in which they are to be tried. If the statute may authorize the court to try one, we see no reason why it may not authorize the court to try all. Such acts have been held constitutional; we know of no case in which it has been held otherwise.

 Harbison v. First Presbyterian Society of Hartford.

For the reasons given we think the act in question, so long as it remained unrepealed, was a valid enactment.

There is no error.

In this opinion the other judges concurred ; except PARK, C. J., who dissented upon the question of the constitutionality of the act of 1874.

 HARBISON V. FIRST PRESBYTERIAN SOCIETY OF HARTFORD.

(46 Conn. 589.)

Ecclesiastical law — religious society — right of trustees to defend in proceedings to test validity of their election.

The trustees of a religious society have no right to defend proceedings to test the validity of their election, at the cost of the society.

ASSUMPSIT. The opinion states the facts. The plaintiff had partial judgment below and appealed.

H. Willey and C. J. Cole, for plaintiff.

L. E. Stanton and W. F. Henney, for defendants.

PARDEE, J. The defendant is, and has been since 1853, a duly organized ecclesiastical corporation, having its location in Hartford. Upon the 10th day of March, 1876, T. Simonds, R. Masterton G. Calder, and H. Harbison, claimed to be the committee and board of trustees of that society by virtue of a lawful election, and no other persons were acting or claiming the right to act as such. On that day, upon the petition of certain other members of the society, alleging that the aforesaid persons had not been legally elected to said office, they were enjoined from selling the pews. Upon the 4th day of April, 1876, other members of the society brought an application to the Superior Court praying that a writ of mandamus should issue, compelling the said persons so claiming to be a committee to call in a legal manner a meeting of said society for the purpose among others of electing a committee. That court, upon the advice of this court, denied the prayer. Thereupon the petition for an injunction was discontinued.

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The said Simonds, Masterton, Calder, and Harbison employed Mr. Cole as an attorney to resist both the application for an injunction and that for a mandamus, and upon the termination of the proceedings drew their order as committee upon the treasurer of the society for \$407, payable to the order of Mr. Cole, and delivered it to him in payment for his services. The treasurer refusing to honor the draft, it was indorsed and delivered by Mr. Cole to the plaintiff, who brought an action thereon and recovered judgment for \$42.98 damages, that sum representing the fees of Mr. Cole in the matter of the injunction. The plaintiff filed a motion in error.

It is the office of the committee to transact the business necessarily incident to the purpose for which the corporation exists, and to defend against legal proceedings endangering either its existence or its rights or its property. Therefore it was their duty to resist the petition for an injunction, for that, if granted, would have barred the society from income from the sale of pews; presumably would have stopped the corporate breath.

But the petition for a mandamus was of a different character; it was purely personal in its aim and effect; the important allegation in it was that the persons respondent, who were then acting as the committee of the society, had not been legally elected to that office, and the real point and purpose of it was to test the truth of that allegation. This is manifest upon its face; for it asked one committee to convene the members of the society for the purpose of electing another. As two committees cannot co-exist, and as we cannot impute to the petitioners a design to force the society to go through the form of electing one which could have no legal existence we are shut up to the interpretation which we have given.

In this question the corporation had no interest; no possible determination of it could affect either the existence or the rights or the property of the society; no corporate duty was neglected by omitting to defend against it. If it should be determined that the committee held the office by legal election, of course there would have been no effect either upon corporation or individuals; if it should be determined that their claim to the office was invalid, there would simply result to the corporation the opportunity and duty to proceed to a legal election. While it is better that corporate offices should be exercised by officers *de jure* than by officers *de facto*, it is not for the reason that corporate life is necessarily put in jeopardy by the latter. Therefore it was not the right of the

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committee to expend corporate money in defending for themselves the personal privilege of holding office; they were not necessary to the corporate existence. Indeed the real peril to the society would seem to rest in the claim that its members as individuals can without its consent, without its knowledge even, expend a part or all of its property in personal contests for the possession of its offices.

There is no error in the judgment complained of.
In this opinion the other judges concurred.

FLANNERY V. ROHRMAYER.

(46 Conn. 558.)

Contract — waiver of defective performance by payment — mechanics' lien — building on wife's land at husband's request.

Payment in full without objection of the contract price of a building, with knowledge on the part of the owner that the work is defective, does not estop him from recovering damages for such defect; but if the defect is slight and the owner is satisfied with the work, he may be found to have waived the defect.

Where a building is erected on a wife's land at the sole request of her husband, a mechanic's lien will not attach to the wife's estate in the land, although she knew of and did not object to the erection while it was in progress.*

BILL to foreclose a mechanic's lien. The opinion states the case. The plaintiff had judgment below.

H. O'Flaherty and J. R. Wittig, for plaintiffs in error.

E. Goodman and F. H. Parker, for defendant in error.

CARPENTER, J. This is a bill to foreclose a mechanic's lien. The services were performed by the petitioner, under contracts with Rohrmayer, in the erection of the foundation and walls of a building on the land of the wife.

The respondents claimed that the work was defectively and im-

* To the same effect *Lauer v. Bandow* (43 Wis. 556), 28 Am. Rep. 571.

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properly done, whereby they sustained damage. On the trial it appeared that a portion of the work was completed and paid for in full without objection, and without any claim that it was not properly done. The court found that the balance of the work was defective to some extent, and assessed the damage at fifteen dollars, which was deducted from the petitioner's demand. Nothing was deducted on account of work previously done and paid for. The court decreed a foreclosure against both respondents, and they allege two errors.

1. That the damage caused by the defective work paid for should have been allowed.

In respect to this the court found that such damage was "small in amount, and the defects of such a character that they must have been apparent at the time of settlement for the work." It further appeared that the work was to be paid for, forty per cent when the foundation and walls were half done, and the balance when the foundation and walls were laid and completed to the satisfaction of Rohrmayer. It also appears that while the work was progressing he visited it every day, and sometimes two or three times, and without complaint until payment was demanded for subsequent work. It seems, however, that the court refused to allow damages, for the reason that the respondent settled with the petitioner and paid him for the work without alleging any defects therein or claiming any damages therefor.

We are not prepared to sustain the decision on the narrow ground on which the court seems to have placed it. We hardly think that the law is so that payment without objection will of itself preclude a party from recovering damages. The right to recover must depend upon all the circumstances. By a reference to the facts it appears that the damage was slight; that the respondent knew of the defect, but was nevertheless satisfied with the work, and paid for it without objection. These circumstances would justify the court in concluding that he intended to waive the slight defects. On that ground we think the decision ought to be sustained, especially as it does not appear that the damage was sufficient to take the case out of the rule "*de minimis non curat lex*." At least there is no substantial material error in this part of the case apparent of record.

2. The other error assigned is, that the court ought not to have passed a decree against the wife, Mary Rohrmayer.

Aside from the statute, which will presently be noticed, it is difficult to conceive on what ground the decree against her can be maintained.

She was not a party to the contract out of which the debt originated. It was the debt of her husband alone, and she was under no obligation to pay it. The fact that she knew of the work and made no objection to it does not make it her debt, and does not charge her land with its payment. Her husband having a life estate in the land might well contract for an improvement which would make it more valuable to him, and her knowledge and silence, without an active participation in the contract, and with no resulting benefit to her or her estate, are insufficient to impose upon her any liability.

But it is claimed that the statute justifies this decree. That provides that a lien attaches where services are performed "by virtue of an agreement with or by consent of the owner of the land upon which such building is erected." It is true the language of the statute seems to be broad enough to include the estate of the wife under the circumstances of this case, if mere knowledge and silence constitute a consent. We think they do not. It has never been the policy of our law to subject the wife's real estate to the payment of the husband's debts, and the tendency of modern legislation is to extend rather than contract this immunity. If the statute is to be interpreted as including the real estate of the wife in cases where she is not a party to the contract, and where it does not appear to be for her benefit or for the benefit of her estate, then it works a radical change in the law relating to the property of married women, and subjects it to the payment of the debts of the husband, thereby and to that extent repealing prior laws on that subject. We cannot believe that such was the intention of the legislature, and must therefore hold that such a construction is inadmissible.

But it is unnecessary to discuss the subject further, for this precise question has been determined by this court in the recent case of *Gilman v. Disbrow*, 45 Conn. 563. That case is directly in point, and requires us to reverse this decree.

There is manifest error in the judgment complained of. In this opinion the other judges concurred.

Thacher v. Stevens.

THACHER V. STEVENS.

(46 Conn. 561.)

Negotiable instruments — indorsement before utterance.

A, for accommodation, indorsed in blank a note payable to the order of B, who subsequently indorsed it above him and it was transferred by a subsequent holder before maturity to the plaintiff, a purchaser in good faith, and without notice. *Held*, that A, having been duly notified of protest, could not show, as against the holder, that his indorsement was not regular.*

ACTION on a promissory note. The opinion states the facts.
Case reserved.

S. W. Adams, for plaintiff.

C. J. Cole, for defendant. Evidence of the contract made by a stranger to the note, who indorses it, has always been held admissible. 1 Greenl. Ev., § 288; 1 Am. Lead. Cas. 322; *Rey v. Simpson*, 22 How. 341, and authorities before cited.

The defendant is not estopped from showing what the contract was as against the plaintiff. The fact that an instrument has been altered from its original form may always be shown. *Burchfield v. Moore*, 25 Eng. L. & Eq. 123; *Gardner v. Walsh*, 32 id. 162; *Holmes v. Trumper*, 22 Mich. 427; s. c., 7 Am. Rep. 661; *Fay v. Smith*, 1 Allen, 477; *Wade v. Withington*, id. 561; *Flint v. Craig*, 59 Barb. 319; *Waterman v. Vose*, 43 Me. 511. See, also, *Wood v. Steele*, 6 Wall. 80; *Heffner v. Wenrich*, 32 Penn. St. 423; *Ivory v. Michael*, 33 Mo. 398; *Owings v. Arnot*, id. 406; *Presbury v. Michael*, id. 542; *Britton v. Dierker*, 46 id. 591; s. c., 2 Am. Rep. 553; 2 Pars. on Notes and Bills, 550.

PARDEE, J. N. W. Taylor made his promissory note for \$500 payable at bank two months from date to the order of James Gill; at the request and for the accommodation of the maker the defendant indorsed it in blank; then it was delivered to the payee, who placed his own blank indorsement above that of the defendant, and transferred it to a third person, who transferred it to a fourth in the city of New York, from whom the plaintiff purchased it for

*See *Herbage v. McEntee*, (46 Mich. 437), 25 Am. Rep. 536; *Dubois v. Mason*, 127 Mass. 32.

a valuable consideration before maturity, believing the indorsements to be in order of time as they were in order of place. Presentment and demand were made ; notice of non-payment was given to the defendant as the second indorser, and this suit is instituted against him in that character.

The defendant insists that he is a guarantor that the note is due and payable according to its tenor, that the maker shall be able to pay it at maturity, and that it is collectible by the use of due diligence ; that therefore there is a variance between the contract alleged and that which he made, and that he has a right to prove the variance by parol testimony.

The case is reserved for the advice of this court.

The evidence is inadmissible. The office of a negotiable note is to pass from holder to holder as a medium of payment. The defendant is to be charged with knowledge, when he made his unrestricted indorsement for the accommodation of the maker and the security of the payee, that the latter intended to and would perfect the negotiability of the note by indorsing it in due order of place above that of his own, and transfer it in open market ; and the defendant is to be held as having authorized the payee to make him responsible as second indorser, and therefore to have barred himself from putting parol restrictions upon the contract implied from the place of his name, as against a purchaser before maturity for a valuable consideration without notice.

Of such an indorser, in *Crozer v. Chambers*, Spencer (N. J.), 256, Chief Justice HORNBLOWER said, that the "mere signature creates no commercial contract whatever, though it may subject him to the liability of second indorser if the payee thinks proper to indorse it and put it in circulation and the note should get into the hands of an innocent *bona fide* holder."

In *Schneider v. Schiffman*, 20 Mo. 511, the defendant having been sued upon his blank indorsement of a note of which he was not the payee, offered parol testimony as to the real contract which he had entered into. The court refused to receive it, saying "the question in the present case is whether this may also be shown against a party who took the note before it was due, in the usual course of business, and for value and without notice ; and we are of opinion that it cannot, and that such a decision would be contrary to the principles and policy of the law in relation to negotiable paper, and generally result in throwing the loss from the party

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who occasioned it by his own act, upon a stranger, who relied upon what he found upon the note."

In *Sturtevant v. Randail*, 53 Me. 157, it is said as follows: "Undoubtedly the order in which the names stand upon the back of the note would be *prima facie* evidence of the relative time at which the indorsements were made, and it may well be that, as against an innocent indorsee for value, in regular course of business, the policy which aims to facilitate commercial intercourse by means of negotiable paper would prohibit a defendant from asserting any extrinsic matter to vary the apparent liability; but as between the original and immediate parties to the contract, or those occupying their position and having their rights only, the consideration of the contract is always the subject of inquiry until once judicially determined."

In *Phelps v. Vischer*, 50 N. Y. 69; s. c., 10 Am. Rep. 433, S. & R. made a note payable to the order of Brown, which was indorsed before delivery to the payee by Bennett, the defendant's testator; then the payee wrote upon the back these words: "For the purpose of making this note negotiable I indorse the same payable to the order of Solomon Bennett without recourse to me as indorser;" signed his name thereto, and transferred the note to the plaintiff, who had knowledge that Bennett's indorsement was prior in time to that of the payee. The court said that "if the plaintiff had purchased the note without knowledge of the order of indorsements he might have supposed that Brown first indorsed it and would then have been a *bona fide* holder."

We do not deny the admissibility of the evidence as between the defendant and the payee. In *Beckwith v. Angell*, 6 Conn. 323, the defendant made a blank indorsement upon a note long overdue, upon the agreement of the plaintiff, the holder, to give further time; the latter wrote a guaranty over the defendant's name; and as between them he was allowed to prove the contract by parol. In *Perkins v. Catlin*, 11 Conn. 213, the plaintiff was the payee, under a special agreement with whom the defendant made the blank indorsement sued upon. In *Laflin v. Pomeroy*, 11 Conn. 440, the plaintiffs, payees, paid the defendant for his blank indorsement. In *Castle v. Candee*, 16 Conn. 234, the plaintiff was the payee. In *Holbrook v. Camp*, 38 id. 23, Holbrook indorsed in blank a note payable to one Downs for the accommodation of the maker. Camp

bought it *after maturity* and undertook to use it by way of set-off against a claim in favor of Holbrook.

In a note to section 133 in the last edition of Story on Promissory Notes there are cited a large number of decisions by courts in our own country and in England as to the legal effect of an indorsement in blank upon a promissory note payable to order by a person who at the time of indorsing is neither payee nor holder. We believe we are not mistaken in saying that in every case cited the plaintiff was either the payee or the holder of the note with notice as to the time when and the contract under which the defendant made his irregular indorsement; therefore the author must be understood as treating only of such instances.

In Daniel on Negotiable Instruments, § 712, it is said: "Whether or not there is the same liberty in the use of parol proof when the note has been passed to a *bona fide* holder for value, and without notice, is a question upon which the authorities are by no means uniform. Some of them confine parol proof to cases in which the note is still in the hands of the original party to whom it was first delivered as a valid instrument; but others declare that it is equally competent in a suit by a *bona fide* holder." Several cases are cited in support of the text. But we think we are not mistaken when we say that in every one of these the plaintiff, at the taking of the note, had notice of the irregular indorsement, therefore no one of them is an authority for the proposition that the defendant in the case before us is not liable in this action to the plaintiff, a *bona fide* holder without notice.

Our attention has also been called to the case of *Good v. Martin*, 5 Otto, 90, in which the marginal note is that "where a promissory note made payable to a particular person or order is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place;" and that "parol evidence is admissible to show the circumstances under which he signed, as they bear upon the foregoing rule."

But this case is of the same class, and we believe that in every case cited therein as an authority the plaintiff was either payee or holder with notice. It is error to the Supreme Court of Colorado. From 1 Colorado Reports, 165, it appears that the note was transferred by the payee directly to Martin, the plaintiff below; of course,

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in this fact there was actual notice to the latter that the indorsement of Good was irregular and open to parol explanation. In *Third National Bank of Baltimore v. Lange*, 7 Reporter, May 7th, 1879 (to appear in Maryland Reports), the marginal note is, that "parol proof is admissible to show the character in which indorsers stand relative to the note." The plaintiff bought the note of the payee, and the court cites *Good v. Martin, supra*. Neither of these cases is an authority for any other proposition than that parol proof is admissible as between parties who have notice of the irregularity of the indorsement.

In the case at bar the payee embraced the opportunity afforded by the defendant, and perfected the negotiability of the note by making his indorsement to stand as the first and that of the defendant as the second, so far as a stranger could know, and put it into circulation; the plaintiff bought it in the market apparently of the second holder after the defendant, possibly a bill-broker, under such circumstances as gave him no knowledge either actual or constructive of any irregularity.

If, as between himself and all persons to whom the payee may transfer a note, the irregular indorser prefers one of the two positions of guarantor or second indorser to the other, he can easily secure his preference by stating it in writing in connection with his indorsement; and in the interest of the negotiability of commercial paper it is better to compel him thus to state it than to require the holder without notice to discover it at the price of a bill of costs.

We advise the Court of Common Pleas to render judgment for the plaintiff.

In this opinion the other judges concurred, except PARK, C. J., who did not sit.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MIX V. NATIONAL BANK OF BLOOMINGTON.

(91 Ill. 20.)

National bank — evidence of existence — certificate of comptroller of currency — negotiable instruments — note transferred for pre-existing debt.

In an action by a National bank on a note, where the existence of the corporation is denied, the certificate of the comptroller of the currency, under section 22 of the National Banking Act, that the association had complied with the law and was authorized to do banking business, was competent evidence, and in connection with proof that the association had done banking business for several years, and the fact that the note was in terms payable at the bank, makes a *prima facie* case.

One who takes a promissory note before maturity in good faith in payment of or as security for an antecedent debt, holds it for a valuable consideration and free from equities. (*See note, p. 46.*)

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

Stephen R. Moore, for appellant.

O. W. Aldrich and T. C. Kerrick, for appellee.

Mix v. National Bank of Bloomington.

SHELDON, J. This was a suit brought by the National Bank of Bloomington, as indorsee, upon a promissory note made by the defendant to one C. M. Nichols, and indorsed by the latter to the plaintiff, as follows:

“\$2,745.25.

BLOOMINGTON, ILL., *April* 28, 1875.

Six months after date I promise to pay C. M. Nichols \$2,745.25, at National Bank of Bloomington, Illinois. Value received, with interest at ten per cent per annum from date if not paid at maturity.

JAMES MIX.”

“Indorsed, C. M. NICHOLS.”

Besides the general issue, there were the pleas of *nul tiel corporation*, *non est factum* verified by affidavit, and partial failure of consideration, upon which issues were joined, and found by the jury in favor of the plaintiff, and damages assessed to the amount of the note and interest, upon which judgment was rendered, and the defendant appealed.

It is objected, that, under the issue upon the plea of *nul tiel corporation*, the court below admitted in evidence the certificate of the comptroller of the currency issued under section 22 of the National Bank Act (U. S. Stat., § 5169), providing (after the association of individuals desiring to organize a National bank has done certain things as required by § 13) that “the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence business.” There was, besides, evidence that the bank had been acting as a National bank for eleven years; and the existence of the bank is acknowledged in the note signed by the defendant, it being made payable at the bank. We think the certificate was properly enough received in evidence, and that the evidence was amply sufficient to establish, at least *prima facie*, the existence of the corporation.

[Omitting an unimportant question.]

The ground of defense mainly relied upon was, partial failure of consideration in that the note was given for the payment of the purchase-price of a number of short-horn cattle bought at a public sale, and that there was a warranty claimed as being contained in a

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printed catalogue and breeding list which had been published and circulated, that the cattle were breeders, etc., and that there had been a breach of the warranty. All the questions which have been raised upon this head may be disposed of, we think, upon the ground simply that this is a defense which is not available to the defendant as against the plaintiff in this suit, the indorsee of the note.

The evidence shows that John Nichols, the father of C. M. Nichols, and C. M. Nichols were indebted to the National Bank of Bloomington upon a note for \$5,000, money borrowed by John Nichols, C. M. Nichols having signed the note as surety; that on October 18, 1875, C. M. Nichols, the payee of the note in suit, left it with the bank as security for the \$5,000 note, at the same time, and before its maturity, indorsing the note. This is the testimony of C. M. Nichols, and it shows the transfer of the note by indorsement to the bank before maturity as collateral security for a pre-existing debt owing by the payee and his father to the bank.

The case of *Manning v. McClure*, 36 Ill. 490, settles the law in this State, that the indorsee of a promissory note before its maturity, taking it as payment or security for a pre-existing debt, shall be deemed a holder for a valuable consideration, in the ordinary course of trade, and shall hold it free from the latent defenses on the part of the maker.

[Omitting a consideration of facts.]

It must be held, then, that the bank, as a *bona fide* indorsee of the note before maturity, as collateral security for a pre-existing debt, took and held it free from the defense of failure of consideration in whole or in part.

The judgment must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — The doctrine of this case is supported by *Swift v. Tyern*, 14 Pet. 1; *Goodman v. Simonds*, 20 How. 343; *Blanchard v. Stevens*, 8 Cush. 162; *Woodruff v. Hill*, 116 Mass. 310; *Norton v. Waite*, 20 Me. 173; *Cobb v. Doyle*, 7 R. I. 530; *Atkinson v. Brooks*, 20 Vt. 569; *Roberts v. Hall*, 37 Conn. 211; *Reddick v. Jones*, 6 Ind. 107; *Gibson v. Connor*, 3 Kelley, 47; *Valette v. Mason*, 1 Smith (Ind.), 80; *Allaire v. Hartshorne*, 1 Zab. 685; *Carlisle v. Wishart*, 11 Ohio, 172; *Outhwite v. Porter*, 13 Mich. 533; *Bush v. Packard*, 3 Harr. (Del.) 385; *Barney v. Earle*, 13 Ala. 106; *Neglee v. Lyman*, 14 Cal. 450; *Bank of Charleston v. Chambers*, 11 Rich. 657; *Boatman's Sav. Inst. v. Holland*, 33 Mo. 49; *Maitland v. Citizens' Bank*, 40 Md. 450; s. c., 17 Am. Rep. 620; *May v. Quimby*, 3 Bush, 26.

It is, however, opposed to *Bay v. Coddington*, 5 Johns. Ch. 54, 9 Am. Dec. 268; *Stalker v. McDonald*, 6 Hill, 93; *Napier v. Elam*, 5 Serg. 108; *Comstock v. Hier*, 73 N. Y. 269; s. c., 23 Am. Rep. 142; *Gopperly v. Cuthbert*, 5 B. & P. 170; *Evans v. Kymer*, 1 B. & Ad. 528; *Royer v. Keystone Bank*, 83 Penn. St. 248; *Fenouillet v. Hamilton*, 35 Ala. (N. S.) 322; *Lee's Adm'r*

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v. Smead, 1 Metc. (Ky.) 628; *Bramhall v. Beckett*, 31 Mo. 205; *Jennem v. Bean*, 10 N. H. 266; *Barborough v. Messick*, 6 Ohio St. 448; *Bertrand v. Barkman*, 13 Ark. 150; *Prentice v. Weisinger*, 2 Gratt 262.

Some of these cases draw a distinction between notes received in payment, and those received merely as collateral security. Such are *Barney v. Earle*, *May v. Quimby*, *Carlisle v. Wishart*, and *Norton v. Waite*, *supra*.

It is conceded that if any thing of value is parted with by the holder, when he takes the paper in payment or as security for the precedent debt, he becomes a holder for value. *Wauver v. Barden*, 49 N. Y. 286, 293.

Where a note has been unconditionally made for accommodation of the payee, an indorsee, taking it in good faith solely as collateral security for an antecedent debt of the payee and indorser, may recover on it against the maker. *Grocers' Bank v. Penfield*, 69 N. Y. 502; s. c., 25 Am. Rep. 231.

For an exhaustive review of the subject, see Bigelow's Bills and Notes, note, 497. The subject is too extensive for our limits.

JOHNSON V. HUMBOLDT INSURANCE COMPANY.

(91 Ill. 92.)

Insurance — fire — limitation of time to bring suit for loss.

Where a policy of fire insurance provides that no action shall be sustainable thereon until an award fixing the amount of the claim, nor unless commenced within twelve months next after the loss shall occur, the action must be brought within twelve months from the occurrence of the fire, and the time does not continue until twelve months after the award.*

ACTION on a policy of fire insurance. The opinion states the case. The defendant had judgment below.

M. W. Robinson, for appellants.

Thomas C. Whiteside and *Frank J. Smith*, for appellee.

WALKER, J. This was an action on a policy of insurance, brought by appellants against appellee. To the declaration appellee filed a plea of limitations, that the suit was not brought within twelve months from the time the loss occurred, according to the terms and conditions of the policy. To this plea appellants filed a demurrer, which was sustained by the Superior Court, in which the suit was pending, and a judgment was rendered against appellee. An appeal was prosecuted to the Appellate Court of the first district, where

*See, *contra*, *Hay v. Fire Ins. Co.*, *post*.

the judgment was reversed, and plaintiffs in the Superior Court appeal, and ask a reversal.

It is stipulated that the policy contained this provision: "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proof of the same made by the assured, and received at this office, in accordance with the terms and conditions of this policy, unless the property be replaced, or the company have given notice of their intention to rebuild or repair the damaged premises." That there was annexed to the policy this condition: "It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim, in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, any statute of limitation to the contrary notwithstanding."

The fire producing the loss occurred on the 14th of July, 1874, and proofs of loss were furnished by appellants, to which no objections were made by the agents of appellee, at its office, on the 21st of July, 1874. This action was commenced on the 13th of September, 1875, on the policy, to recover for the damages sustained by the fire. The action was not brought within twelve months after the loss occurred, but within twelve months from the expiration of sixty days after the loss.

When the judgment of the Superior Court was reversed by the Appellate Court, counsel for plaintiffs in the Superior Court stipulated that they could not amend so as to obviate the effect of that decision, and that its decision was, in fact, final, and that court thereupon granted this appeal.

It is agreed that the only question presented by this record is, whether, under the above condition, the suit was brought 'in time. Appellants contend that the twelve months did not begin to run until the expiration of sixty days after the occurrence of the fire, whilst appellee contends that it began to run from the time of the fire. It all depends on the meaning of the language the parties

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have employed to express their intention when the contract was executed by them. As they expressed and must have understood it, we must carry it into effect.

All persons know that in giving force to laws and contracts of every description, the intention as therein expressed must govern. That intention must and can only be sought in the language employed in the instrument itself, and from the ordinary or popular meaning of the words themselves, unless it is apparent they are used in a technical or particular sense. According to these rules, we are wholly unable to perceive how the meaning of this language can be misunderstood, or that different persons could arrive at other than one conclusion by simply reading the clause. The words are plain, simple, and have a well-understood and accepted meaning. There can be no equivocal or doubtful definition attached to them, either separately or in their grammatical arrangement. The language that a suit or action shall not be brought until after an award shall be obtained fixing the amount of the claim, in the manner therein provided, can only mean what it says: that such an award is an indispensable prerequisite to the bringing of a suit or action, unless the assured should be prevented by the company.

The next clause of the condition, "nor unless such suit or action shall be commenced within twelve months next after the loss shall occur," is equally clear and explicit. When did the loss occur? Manifestly at the time the fire destroyed the property. In what consisted the loss? Obviously in the destruction of the building by fire. We are wholly unable to conceive that language could have been used that could have rendered the meaning plainer. Other words might have been employed to express the same meaning, but to our minds they could not have been clearer or freer from doubt. This seems to us to be one of those propositions which are so plain that reasoning cannot add any thing to their perspicuity.

It is, however, urged, that the word "occur" is used in the sense of "accrue," and that this sense requires us to apply it to the suit or action. The word "occur" means "to happen," in its general and most popular sense, whilst the word "accrue" is to be added or attached to something else, in its generally received sense; but if we were to substitute the word "accrue," then, in its grammatical connection, it would mean that the loss had attached to appellants, and that was when the fire destroyed the property, and would not change the obvious meaning from what it is as written. It would

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not be construction to say, the condition means a suit or action might be commenced within twelve months after an action had accrued. It would not only be to change the grammatical structure of the clause, but it would be to make a new and different contract for the parties.

It is, however, insisted, the clause in the policy that the loss was to be paid sixty days after due notice and proof of the same should be made by the assured, and received at the office of the company, limits and controls the after-inserted condition prohibiting the bringing of an action more than twelve months after the loss should occur. We are unable to perceive that it controls this condition. If either has that effect, it would seem the latter controls the former. The two clauses considered together, obviously provide that the company shall have sixty days within which to make payment, after notice and proof of loss, but in no event should a suit or action be commenced after the expiration of twelve months from the date of the fire producing the loss. Any other meaning attached to the language, it seems to us, would be strained, unreasonable, and in direct violation of the plain intention of the parties, clearly expressed.

We are referred to authorities which are supposed, by appellants' counsel, to hold similar language in other policies means that the assured may sue at any time within twelve months after the sixty days reserved by the company to make payment has expired. We have examined the authorities referred to, but think they fail to sustain his position ; but even if they did, although by respectable courts, we should not feel bound by them as authority, and should hesitate long in reaching and adopting such a conclusion.

We are, therefore, of opinion the Appellate Court decided correctly in holding the plea presented a defense, and that the judgment must be affirmed.

Judgment affirmed.

Erie and Western Transportation Company v. Dater.

ERIE AND WESTERN TRANSPORTATION COMPANY V. DATER.

(91 Ill 193.)

Carrier — bill of lading — limitation of liability — evidence.

The acceptance of a bill of lading restricting the carrier's liability, and the previous practice of accepting similar bills of lading, are some evidence, but not conclusive evidence, that the limitation was known and assented to by the shipper.*

ACTION of damages for failure to carry goods. The opinion states the case. The plaintiff had judgment below.

Geo. Gardner and Geo. B. Hibbard, for appellant.

Melville W. Fuller, for appellees.

SHELDON, J. On October 7, 1871, appellees delivered to appellant, at Chicago, two hundred barrels of flour for transportation to New York city, and received for the same a bill of lading. The flour was put into the warehouse in Chicago to await the loading of the vessel for which it was intended, and on the night of October 8 and 9, 1871, was destroyed by the great Chicago fire, without any negligence on the part of any one. This action on the case was brought by appellees against appellant, as a common carrier, for failing to carry and deliver the flour to the consignee. The general issue was pleaded, and the cause tried by the court without a jury, resulting in a finding for plaintiffs for the value of the flour and interest and judgment, from which defendant appeals.

This same case was before this court at a former term, and is reported in 68 Ill. 369, when the judgment in favor of the plaintiffs below was reversed, on the ground of being against too many defendants, the opinion of this court on the merits being in favor of such plaintiffs.

The bill of lading delivered to the consignors contained a provision relieving the carrier from liability for loss by fire while the property is in transit, or while in depots, etc. This court has repeatedly held, that there must be the assent of the shipper in order to make binding upon him such a limitation of the carrier's com-

* See note, 80 Am. Rep. 543.

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mon-law liability, and that with such assent it is binding. As the bill of lading was the only evidence of the delivery of the flour to appellant, or of any contract for the transportation of the same, and as there was evidence that appellees had before accepted quite a number of bills of lading of a similar character in the course of their business with appellant, two points are made by appellant for the reversal of the judgment: 1st. That from the fact, alone, of the acceptance of the bill of lading, the assent of the shipper to its terms and conditions should be inferred. 2d. That appellees should be held to have assented to the contract expressed in the bill of lading from their receipt of the many similar bills of lading, running through the years 1870 and 1871, from the appellant without objection, or be estopped from setting up their ignorance of the contents of the instrument and consequent want of assent to its provisions, by such course of dealing with appellant.

It is insisted that the bill of lading, being the only contract between the parties, and relied upon by the appellees as such, must be taken as a whole, and all its provisions must be regarded as binding upon both parties. This same point was made and urged when the case was here before, it being then said: "This bill of lading, appellants insist, was the contract of the parties, by which they are bound, and the provisions of which are plainly and easily understood by any business man, and the assent of the shipper to the terms contained in it should be presumed." And it was held that the assent of the shipper to its conditions was not to be inferred from the fact of acceptance alone. The same fact, too, appeared before, of the previous acceptance by these shippers of a large number of similar bills of lading in the course of their business with appellant; yet with these same facts there appearing, it was held that the finding of the court trying the case, in favor of the plaintiffs below, should not be disturbed by this court. We do not see that the case, as to the facts, is now presented any more favorably for appellant than before — the facts appeared to be substantially the same. But we are asked by appellant's counsel to reconsider the subject of the qualification of the liability of carriers as contained in *bills of lading*, especially bills of lading used in inter-State trade (as the bill of lading in this case was) or in foreign commerce, and hold that the assent of the shipper to the terms of such a bill of lading will be presumed from its acceptance by him without objection. It is urged that such is the holding of other courts of highest authority,

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and that it is desirable there should be uniformity as near as may be, in such a rule of commercial law.

The contrary rule to that contended for by appellant has been so well established by repeated and the uniform decisions of this court, that we must adhere to it as the settled doctrine of the court, although it may not be in harmony with the rule of other courts, and although there may result the supposed inconvenience of diversity in this regard. As already remarked, we have before held in this very case that the shipper's assent to the clause of limitation, here, of the carrier's common-law liability was not to be presumed from the acceptance of the bill of lading alone,—that is, conclusively presumed. *Anchor Line v. Dater et al.*, 68 Ill. 369. And other like decisions are *Illinois Central Railroad Co. v. Frankenberg*, 54 id. 88; s. c., 5 Am. Rep. 92; *Field v. Chicago and Rock Island Railroad Co.*, 71 Ill. 458; *Merchants' Dispatch Transportation Co. v. Theilbar*, 86 id. 71; *Merchants' Dispatch Transportation Co. v. Jæsting*, 89 id. 152; *Merchants' Dispatch Transportation Co. v. Leysor*, id. 43.

Nor do any of these decisions intimate that there should be any restriction of the rule, as is claimed there should be, to the case of other paper writings than a bill of lading proper, such as notices, receipts, tickets, etc., and they must be taken as not to acknowledge any such distinction.

Upon the second point made by appellant, we see no ground for holding appellees estopped from denying assent to this condition in the bill of lading, as arising out of the previous course of dealing between the parties in the giving and acceptance of like bills of lading, containing this same provision.

The proof in that respect was accompanied with the testimony of the appellees that they were unaware of the provision. There was nothing, here, of the kind which appeared in the cases of *Oppenheimer v. United States Express Co.*, 69 Ill. 62; s. c., 18 Am. Rep. 596; and *Field v. Chicago and Rock Island R. R. Co.*, *supra*, where the receipts or bills of lading were in the previous possession of the consignors, and the blanks in them had been filled up by the consignors or their clerks, there having been a previous like practice in respect to shipments before and where, although there was the testimony of the consignors that they had no knowledge of the stipulations limiting the responsibility of the carrier, and never assented to them, this court said, in the former case, that the cou-

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signors must be held to have had such knowledge, and in the latter that it was impossible, in the very nature of things, that the contents of the bills of lading should not have been known and well understood by the consignor, and that the facts existing were sufficient to outweigh such contrary statements of the consignor and his clerk; and the finding of the court below that there was such knowledge and assent was sustained. But there was no such evidence, in the present case, of the consignors having the bill of lading previously in their possession and filling it out, or of a practice, before, of doing so with respect to similar bills of lading, or of having any such in their possession for the purpose of filling out for use. There is nothing here inconsistent with what was said in *Mer. Dispatch Trans. Co. v. Moore*, 88 Ill. 138; s. c., 30 Am. Rep. 541, as the presumption there spoken of was indulged in the absence of evidence to the contrary. It was not intended to decide that the presumption was conclusive.

The facts relied on by appellant of the acceptance of the bill of lading, and of the previous practice in giving and receiving similar bills of lading, were evidence going to show that the limitation of liability contained therein was known and assented to by appellees, but they were not, either or both of them, conclusive evidence thereof. It was a question of fact, to be determined upon the whole evidence.

We cannot say that the finding of the court, sitting as a jury, upon all the testimony in the case, should be set aside as against the evidence, and the judgment will be affirmed.

Judgment affirmed.

CHICAGO AND IOWA RAILROAD COMPANY V. RUSSELL

(91 Ill. 298.)

Negligence — master and servant — telegraph pole near railway — contributory negligence.

A brakeman in defendant's employ, descending the ladder of a moving freight car, to throw a switch, was struck by a telegraph pole standing only 18 inches from the car and killed. The pole had been suffered to remain in

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that position three years, but there was no evidence that defendant put it there or knew of its existence. There was no evidence that the brakeman knew of it. *Held*, that an action of damages for the killing was maintainable.*

Kretzinger, Veeder & Kretzinger, for appellant.

A. J. Hopkins and Charles Wheaton, for appellee.

SHELDON, J. This suit was brought by William H. H. Russell, as administrator of the estate of James C. Russell, deceased, against the Chicago and Iowa Railroad Company, under the statute of this State, for causing death by wrongful act, neglect or default.

The circumstances of the case were as follows: On the 1st day of June, 1875, James C. Russell commenced work for the railroad company in the capacity of brakeman on one of its freight trains running from Aurora to Forreston and return. On the 2d day of November, 1875, as the train upon which Russell was employed was on its return trip to Aurora, the station agent at Mount Morris, a station on the road, informed the conductor when the train reached that place that there were two cars on one of the side tracks to be attached to his train. At that place there are three tracks, viz.: the main track, the passing track and a back or business track. These two cars which were to be attached to this train were on the back track. To take these cars with them the conductor and brakeman ran the train on the passing track, uncoupled the train, and, with engine, tender and one car, switched on the back track, coupled these and three other cars, and pulled out to switch back on the passing track. Russell had turned the switch when the engine, tender and car were backed down on this track to take the cars there, and after assisting in coupling them, he climbed upon the first car back of the tender, but as the other brakeman was on top of one of the cars, Russell started to get down and turn the switch so as to throw the engine and cars back on the passing track and connect them to the main train. As he was climbing down the ladder of the car to throw the switch, he was struck by a standing telegraph pole, which was only eighteen inches from the car, and knocked between the cars on the track, run over and almost instantly killed. There was a verdict for the

*Compare *Loockjoy v. Boston & Lowell Railroad Corporation* (125 Mass. 79), 28 Am. Rep. 206.

plaintiff, upon which judgment was entered, and the railroad company appealed.

Appellant claims that the evidence is not sufficient to support the verdict.

It is said there is a failure of proof that the telegraph pole was placed near the track by the railroad company, its agents or servants, or that the company had any knowledge or notice thereof.

It was not essential to the liability of the railroad company that it should itself have placed the telegraph pole where it was; it was sufficient that the company should have suffered it to be and remain in such dangerous proximity to the track.

It is true there is no direct evidence that the company had actual knowledge or notice of the position of the telegraph pole. There was the testimony of one witness that he had known of the telegraph pole being where it was since in March, 1875, and of another, a brakeman on the road, that he once came in contact with the same pole in 1872. From the length of time of the telegraph pole standing where it did, as shown by the evidence, the jury were warranted in finding that the company knew of it—that they ought to have known of it, and so might be considered as having notice of it. This court has often decided that notice of a defect or obstruction will be presumed after the lapse of a sufficient time. *City of Springfield v. Doyle*, 76 Ill. 202; *City of Chicago v. Fowler*, 60 id. 322.

[Omitting other points.]

It is said again, deceased was negligent in not looking and seeing the pole in time to save himself. He had reason to believe, after the cattle shutes and elevator were passed, that the track was clear. His eyes, it may be supposed, were directed to the side of the car while he was in the act of getting down. There is no evidence that he knew any thing of this telegraph pole, or that he was ever required, previous to this 2d day of November, 1875, to assist in switching cars off on this back track at Mount Morris.

[Omitting a minor point.]

It certainly was culpable negligence in the railroad company to permit for so long a time, such an obstruction to be in such close proximity to its track that an operative of the road should come in contact with the obstruction and be killed, when on a car, engaged in the necessary performance of his duties in the management of the train. We do not find in all the conduct of the deceased any

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such negligence on his part as should preclude a recovery in the case.

[Omitting minor considerations.]

The judgment will be affirmed.

Judgment affirmed.

 INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY CO. v. TOY.

(91 Ill. 474.)

Master and servant — duty of master in respect to machinery.

A railway engineer was killed by the explosion of a locomotive boiler. The boiler was made of the best material, and by first-class manufacturers; it had not been used long enough to create a reasonable suspicion of its unsafe condition, the defect could not have been discovered by any of the usual tests, and its appearance did not indicate its unsafe condition. *Held*, that the company was not answerable, being bound only to provide machinery of good material, constructed in a workmanlike manner.*

ACTION for negligence. The opinion states the case. The plaintiff had judgment below.

Fairbank & Gere, for appellant.

WALKER, J. It appears that about the 17th day of January, 1875, one Wm. F. Hiller, a fireman of an engine used on the Indianapolis, Bloomington and Western railroad, was killed by an explosion of the boiler of the engine. Appellee, as administrator of Hiller's estate, brought an action against the company, averring negligence on its part in not providing suitable, safe and properly constructed machinery, whereby Hiller was killed, and sought to recover damages therefor. A trial was had, resulting in a verdict against the company for \$1,950, upon which, after overruling a motion for a new trial, the court rendered judgment, and the company appeals.

It is claimed that the recovery is wrong, because it is not supported by the evidence, and, in the next place, because the railroad

*See *Grand Rapids, etc., R. Co. v. Huntley* (38 Mich. 537), 31 Am. Rep. 321, and note *ibid.*

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was, at the time the explosion occurred, in the hands, under the control, and being operated by, a receiver, and that proper evidence offered by appellant was rejected, and the court erred in giving and refusing instructions.

We are clearly of opinion that the evidence fails to show a cause of action. It appears, from the evidence, that the engine which caused the injury was at the time employed in the yard for switching purposes; that a portion of the left-hand side sheet of the boiler gave way, which caused Hiller's death. Witnesses of intelligence, and who are unimpeached, testified that the engine was of first-class manufacture, built by a manufactory having reputation for constructing good and reliable machinery. The fire-box was constructed of copper, the best and most expensive material used for the purpose. The average time such a box lasts, in use, is seven or eight years, and it is not regarded as being dangerous under five years. This had been in use only about three and a half years. The stay-bolts had leaked some, but that was not regarded as indicating the slightest danger. They and side sheets frequently leak, but that does not indicate weakness or want of safety. All leakage in the fire-bolts had been reported and properly repaired. Experts testified they could not see how it was possible, with the prudence and care ordinarily used in the management of railroads, to discover the danger in this engine, as was shown by the explosion; that the employees in charge of the locomotive were careful and prudent men.

On the part of appellee, witnesses testified that they did not consider the engine safe; but their opinions seem to be based principally on examinations made after the boiler bursted. Webb, an engineer, testified, that he examined the boiler after the explosion, and it did not look very safe. He says, the thickness of the sheet could not be determined by examination, without cutting through, but if the heads of the bolts were worn, that could be seen. Harvey, an engineer who used this locomotive half the time, says the heads of the bolts had leaked; that he reported, and they were repaired; that he did not regard it very safe, and did not use much steam. He was on the engine at 7 o'clock in the morning of the day of the accident, but did not, on leaving it, report to the other engineer who took charge that he regarded it unsafe. Brash, a relative of the deceased, and the engineer in charge at the time, testified that he could not say he, at the time, regarded the engine

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as unsafe. Brash used it, he says, without protest, and was unable to say he was afraid of any thing happening. He had reported leakage, and repairs were promptly made.

From this evidence we are wholly unable to see how appellant can be held liable, unless it was an insurer of the safety of its employees. If only the evidence of appellee was considered, it wholly fails to make a case. There is nothing in it showing the slightest neglect of duty on the part of appellant. Ordinary means of detecting the unsafety of the engine were entirely inadequate for the purpose, nor does the evidence of any witness show that there was any sign of unsafety. The result showed it was unsafe, and after the boiler had opened all could then see its defects, but none could before. The engineer in charge points out nothing to indicate its unsafe condition before the explosion, nor does his predecessor. Their opinions, manifestly, are based on an examination made after the accident, or they would have specified the defects upon which to conclude it was unsafe. We have searched the evidence in vain to find any fault on the part of the company, but none is found. No one of the witnesses has suggested any fault or the omission of any duty on the part of the company.

Employers are only required to provide machinery of good material, and to have it constructed in a good and workmanlike manner. They, whether as individuals or corporations, are not insurers of their employees against injury from its use. In this case the locomotive was made of the best material, and by first-class manufacturers, and had not been used a sufficient length of time to create any suspicion of its unsafe condition, which could have been discovered by any of the tests usually employed for the purpose, and its appearance did not indicate its unsafe condition. To have detected it, the boiler would have been greatly injured, by cutting through its walls. We are unable to see that those having charge of the road and its machinery omitted any duty, and the company cannot be held liable for the loss.

This view of the case renders it unnecessary to discuss the other questions presented by appellant.

The evidence being wholly insufficient to support a recovery, the judgment of the court below is reversed.

Judgment reversed.

ROPER V. SANGAMON LODGE.

(91 Ill. 518.)

Surety — on official bond — laches of obliges — previous defalcation.

A surety on the bond of the treasurer of a secret society, conditioned for the faithful application of the trust moneys, cannot waive liability for a misappropriation by the mere fact that the treasurer had misappropriated the trust funds in the preceding year, to the knowledge of the officers and members of the society, but not of the surety, and had been re-elected without any communication of such defalcation to the surety. (*See note, p. 63.*)

Where a treasurer is re-elected, reporting a certain sum of trust moneys in his hands from the preceding term, the sureties on his official bond for the new term must answer for any defalcation in that sum, and cannot throw the responsibility therefor on the sureties of the former bond.*

Robinson, Knapp & Shutt, for appellants.

Palmer, Palmer & Ross, for appellees.

WALKER, J. It appears that John A. Hughes was elected treasurer of appellees' lodge. He so acted from the 1st day of January, 1875, until the 30th of June following. It is agreed by the parties that at the commencement of this term of office he reported to the lodge that he had the sum of \$436, money of the lodge; that on the 30th of June, the end of his term, he should have had in his hands \$561, which he had received and failed to pay over to his successor. The suit was on the bond given by Hughes, as such treasurer, and service was had on the sureties but not on Hughes.

The sureties pleaded *non est factum*, and a special plea, that for two terms preceding the term commencing on the 1st of January, 1875, Hughes, the principal, was treasurer, and at that time was a defaulter to the lodge for moneys previously received and misapplied; that it was then known to the officers and members of the lodge that he was a defaulter, and the sureties were ignorant of the fact; that the lodge is a secret organization, of which defendants were not members, and were ignorant of its business; that it was the duty of the officers and members of the lodge, when the bond

* Compare *Inhabitants of Rochester v. Randall*, (105 Mass. 295), 7 Am Rep. 512, and note, 521.

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was executed, to inform defendants that Hughes was a defaulter, and defendants were misled by the lodge having re-elected him, and thereby induced them to believe he had acted faithfully, but the officers or members gave to defendants no such notice. The plea concludes by insisting the bond is void. The court sustained a demurrer to this plea, and that decision is assigned for error.

It is also urged, that the court erred in refusing to permit appellants to prove that the default accrued and the misappropriation of the money was during the term previous to this election on the 1st of January, 1875, when other persons were his sureties, for the purpose of fixing the liability for the default on the sureties on the bond covering the previous term.

It is urged that the special plea presented a complete defense to the action; that the officers and members of the lodge, knowing of the defalcation, and re-electing Hughes treasurer, operated as a recommendation of his honesty to all persons not members of the lodge; that such conduct on the part of the lodge was calculated to and did mislead appellants and operated as a fraud upon them, and the concealment by the officers and members of the fact that Hughes was a defaulter when they signed his bond, was a positive fraud.

There is a class of cases in which it is held that it is fraud to fail to disclose defects on the sale of property, and silently stand by and permit another to act upon the supposition that he is purchasing a good title, when the person claiming an adverse title or interest, knowing the fact and having the opportunity, fails to assert his claim. So, of many other transactions it is held to be a fraud to fail to disclose facts that would prevent the other party from acting. But the rule does not apply when the defect or important information is as accessible to one person as the other. One person is not required to act as the agent of another when the latter, by reasonable diligence, may acquire the information.

If a person knowing another to be utterly insolvent, proposed to credit him if he would procure sureties, he cannot be held to have acted in bad faith by failing to apprise the surety that his principal is utterly insolvent. We presume no one would regard such a failure to apprise the surety of the fact of the insolvency of the principal, as a fraud, and yet had the surety known the fact, he would probably not have indorsed for the principal. And this is held not to be a fraud, because it was the folly of the surety not to have learned the financial standing of the principal. The

avenues of information were open to him, and it was his duty to have used the means to inform himself, and failing to do so, he must suffer the consequences of his inaction. In such a case, however, if the person extending the credit were to use any artifice to throw the surety off of his guard and to lull him into a false security, and he was thereby deceived, that would amount to a fraud. But mere failure to communicate the fact in such a case does not amount to bad faith.

In this case, it is urged, that as this was a secret organization, information as to Hughes' integrity was not accessible to appellants, as they were not members of the order. We apprehend that Hughes' account books were not under the seal of secrecy. If appellants had requested, he could, if disposed, have shown his books to them. Or had they inquired of the officers of the lodge, or even of its members, they would, if within their knowledge, have been required to communicate correct information. It is thus apparent that the sources of information were open to appellants had they been disposed to pursue them. But the officers and members were asked nothing, nor did they say any thing, and we cannot hold they were guilty of a fraud.

It is likewise urged, that the court should have admitted evidence to prove that the defalcation occurred the term before appellants became sureties on this bond, and thus show that the sureties on his bond for the preceding term were liable. In the case of *Morley v. Town of Metamora*, 78 Ill. 395; s. c., 20 Am. Rep. 266, the same defense was interposed. In that case, as in this, the supervisor was his own successor, and his sureties interposed the same defense, but it was held not to be good. In that case it was said, "It is not made to appear very clearly that whatever default occurred, took place in the first year the supervisor was in office; but conceding that fact, we do not think it relieves the sureties on the bond upon which this action is brought, from liability. The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. The report was approved, and we must presume it was true. * * *

In contemplation of law, the money mentioned in his report was in the hands of the supervisor, and the undertaking of the sureties on his bond was that he should account for it. It was as much his duty to account for whatever funds were in his hands at the end of the first year, as it was to account for whatever should be received

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during the second year. The law made the sureties responsible for any default in that regard. There could be no action maintained against the sureties on the first bond at the expiration of that year, for there was no one who could make demand for the money the supervisor reported as having in his hands, so as to establish a default." And the case of *Pinkstaff v. People*, 59 Ill. 148, is referred to as sustaining the decision in that case.

We think the case of *Morley v. Metamora*, *supra*, is decisive of this question. We are unable to distinguish this from that in any essential particular. Appellants undertook that Hughes should account for and pay the money, on orders from proper authority, when required, and this he failed to do, and appellants must make his default good.

We perceive no error in the record and the judgment must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—It is well settled, in England, that if the master discovers that the servant has been dishonest in the course of his service, and instead of dismissing him continues him in service, without the surety's knowledge or consent, he cannot resort to the surety for any subsequent defalcation. *Phillips v. Foxall*, L. R., 7 Q. B. 666; s. c., 3 Eng. (Moak) 273. This doctrine was reiterated in *Sanderson v. Aston*, L. R., 8 Ex. 73, and *Burges v. Eve*, L. R., 13 Eq. 458.

The English cases go even further, and hold, as in *Railton v. Mathews*, 10 Cl. & F. (House of Lords), that mere non-communication of circumstances affecting the surety's credit, prior to the execution of the bond, known to the obligee, and which if communicated to the surety would have prevented his undertaking the obligation, was undue concealment, although it may not have been not willful or intentional, and released the surety.

These cases are distinguished in *Atlantic and Pacific Telegraph Co. v. Barnes*, 64 N. Y. 385; s. c., 21 Am. Rep. 621, where the contrary of *Phillips v. Foxall* is held, it not appearing that the servant's default was dishonest, nor but that it might have been caused by absence, sickness, or unavoidable accident.

In *Atlas Bank v. Brownell*, 9 R. I. 61; s. c., 11 Am. Rep. 231, it was held that mere negligence on the part of the obligee would not discharge the surety, but there must be a fraudulent concealment of material facts. In that case the concealment was of the fact that the principal, a cashier, had been losing money by gambling, in consequence of which the directors of the bank exacted additional security. The above English cases were not cited.

In *Graves v. Lebanon National Bank*, 10 Bush, 28; s. c., 19 Am. Rep. 50, sureties on a cashier's bond were induced to execute by a statement, published by the directors, according to law, showing good management of the bank's affairs. The cashier was at the time of the publication a defaulter, which the directors might have learned by the use of slight care. Held, that the sureties were discharged.

MCLEAN COUNTY COAL COMPANY v. LENNON.

(91 Ill. 561.)

Damages — measure of, in trover, for coal mined on another's land.

In trover for coal dug and carried away from the land of another, the measure of damages is the value of the coal at the mouth of the pit or shaft, less the cost of carriage from the bed thither, but allowing nothing for digging, separating, breaking or other acts necessary to render it marketable. (See note, p. 68.)

TROVER. The opinion states the facts. The plaintiff had judgment below.

Stevenson & Ewing, for appellant.

Tipton & Pollock, for appellee.

BAKER, J. This was trover, by John Lennon, the appellee, against appellant, to recover damages for coals taken by it from the land of appellee and converted to its own use, without his consent. The case was tried before a jury, and a verdict was returned in favor of appellee for \$259. Judgment was rendered on the verdict and this appeal was taken.

The principal question involved in the suit is as to the correct rule for the measure of appellee's damages for the coals taken by appellant.

Robertson v. Jones, 71 Ill. 405, was trespass for taking coal from a mine. We there said, the plaintiff "has the right to recover the value of the coal after it is dug in the bank; or he could recover the value of the coal at the mouth of the pit, less the cost of conveying it, after dug, from the mine to the mouth of the pit. This rule is founded in justice, and seems to be sustained by the authorities."

We afterward, in the case of *McLean County Coal Company v. Long*, 81 Ill. 359, applied the same rule for the assessment of damages in an action of trover; holding that in either form of action the plaintiff was entitled to compensation only for the damage he had actually sustained, unless it was a case of trespass calling for vindictive damages. We said, "for the expense and trouble of sepa-

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rating the coal from its kindred layers and making it a chattel, the defendant cannot claim to be reimbursed ; but the coal had no value as a salable article without being taken from the pit, and any person purchasing the coal in the pit would have deducted from the price the cost of bringing it to the pit's mouth."

During the trial the Circuit Court had used this language : "I understand the measure of damages is, the value of the coal at the time of the conversion. I think the measure of damages is, the value of the coal at the mouth of the shaft, less the expense of drawing it up." We quoted this language, and suggested that if the court had adhered in the instructions to the rule thus announced, it would have conformed to our views of the law and to former decisions of this and other courts. We said, "the court should have told the jury the plaintiff could recover as damages the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it is dug to the mouth of the shaft. This is, in effect, saying he can recover the value of the coal when it first became a chattel by being severed from the mass and under their control." We referred to the case of *Sturges v. Keith*, 57 Ill. 451 ; s. c., 11 Am. Rep. 28, and announced the doctrine to be that the damages are to be estimated at the value when the chattel is converted.

In *Illinois & St. Louis Railroad & Coal Company v. Ogle*, 82 Ill. 627; s. c., 25 Am. Rep. 342, which was an action of trespass, the court had instructed the jury to allow the plaintiff the value of the coal taken, estimated at the pit mouth, less the cost of carrying it from where it was dug to the pit mouth, allowing the defendant nothing for the digging ; and the instruction was held to be correct and the judgment was affirmed. We there quoted with approval this language of Lord DENMAN, in *Morgan v. Powell*, 43 Eng. C. L. 734: "The defendant had no right to be reimbursed for his own unlawful act in procuring the coal, nor can he, properly speaking, bring any charge against the plaintiff for labor expended upon it. But it could have no value as a salable article without being taken from the pit. Any one purchasing it there would, as of course, have deducted from the price the cost of bringing it to the pit's mouth." We again stated the rule for the assessment of damages to be the value of the coal at the mouth of the pit, after deducting the cost of removing it from the place where mined to the pit's mouth.

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The instructions of the court given in the case now under consideration are in conformity with the rule announced by us in the cases to which we have referred. The several instructions given inform the jury, in substance, that they should allow the plaintiff the value of the coal at the mouth of the shaft, less the cost of conveying it from where it was dug in the pit to the mouth of the shaft.

It seems the coal in controversy was mined by digging out the clay from under it, when the weight of the top would break it off. This left the coal in large masses, mixed with sulphur, slate, stone and clay. These masses had to be broken up and the sulphur, slate, stone and clay removed before the coal was in a condition to be put on the cars and run out to the shaft.

As we understand the claim of appellant, it is that the expense of breaking up these masses and removing the extraneous substances, and the time and labor of the miner in brushing his road, should all be deducted from the value of the coal at the mouth of the shaft.

The evidence shows the brushing of the road was necessary in order to reach the coal and break it loose, and on principle, the wrong-doer should not be allowed compensation for the labor expended in converting the property taken into a chattel.

There was no conversion to the use of the appellant of the aggregate mass broken off by undermining, but a conversion of the coal after it was broken up and separated from the rock, slate, sulphur and clay, after it existed as coal, as a chattel distinct and separate from the various other substances with which it was primarily imbedded. This separation was a necessary part of the operation of mining it, and of its production as an article fit for commerce and use. Until such separation it did not become the chattel called coals. It was the coals, and not a conglomerate mass of coal, slate, sulphur, clay and other substances, that were taken and converted by appellant and lost to appellee. As shown by the evidence, this slate, sulphur, stone and clay were left there. The appellant is not entitled to be reimbursed for the expense and trouble of detaching the coals from the surrounding substances. It is the value of the article when it first exists as coals that forms the basis of the measure of damages. This severance of the several substances was part and parcel of the unlawful act of procuring the coal, and was part of the labor expended in producing the chattel, and for such unlawful act and labor no charge can be made.

The rule as stated in *Robertson v. Jones*, that the plaintiff can recover "the value of the coal at the mouth of the pit, less the cost of conveying it, after dug, from the mine to the mouth of the pit;" the rule as stated in *McLean County Coal Company v. Long*, that the plaintiff can recover as damages "the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it is dug to the mouth of the shaft;" and the instruction that was sustained in *Illinois and St. Louis Railroad and Coal Company v. Ogle*, to the effect that the value of the coal taken, estimated at the pit mouth, less the cost of carrying it from where it was dug to the pit mouth, allowing nothing for the digging, was the measure of damages, would all have to be disregarded in order to hold, as is here contended for, that the labor expended in separating the stone, slate, sulphur and earth from the coal, after the mass containing the coal first broke loose upon the removal of the underlying clay, should be deducted from the value of the coal at the mouth of the pit. We are unable to see how such severance of other substances from the coal forms any part of the conveyance, carriage or transportation of the coal from the place where dug to the mouth of the pit; and by the rule as heretofore announced, the cost of such conveyance, and that only, can be deducted from the value at the mouth of the shaft.

The severance spoken of in the *Long* case and in other cases must be understood as including all the acts done and labor used in order to sever and separate the coal from the mass of other material and render it that chattel and article of commerce known as coal, for not otherwise will the language used be consonant with the rule enunciated in that and the other cases. When detached from the clay, stone, slate and sulphur, and after all the labor has been bestowed upon it that is required to make it the coal of commerce, then, and not till then, is it to be considered as fully severed from the mass and under the control of the miner; and then, and not till then, is the conversion complete. Then the value attaches which becomes the basis of the measure of damages, and to ascertain that value, we deduct from the value at the mouth of the pit the cost of transportation from the place where dug to the mouth of the pit. This affords a simple and certain rule for the ascertainment of the damages, and is consistent with former decisions of the court and avoids giving compensation to the trespasser and tort-feasor for his labor unlawfully expended in producing the coal.

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The same rule is held in the English cases which have been heretofore cited and approved by us. *Martin v. Porter*, 5 M. & W. 302; *Morgan v. Powell*, 43 Eng. Com. L. 739; *Wild v. Holt*, 9 M. & W. 672. In these cases, as in former decisions of this court, expressions such as "the value of the coal as soon as it exists as a chattel," and the like, are used; but such expressions are uniformly found in the immediate connection with some such statement as that in the leading case of *Martin v. Porter*, where it is said "which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got, to the pit's mouth." Thus showing that the time fixed for the valuation of the coal is after all labor on it has been performed, and it is severed from the other layers and substances, and first exists as the chattel to which the labor bestowed was intended to reduce it. None of these cases indicate an intention to allow compensation for the labor expended in procuring the coal.

With the law thus understood, the evidence in the record is amply sufficient to sustain the finding of the jury and the amount of damages assessed.

There was no error in refusing the instruction asked by the appellant; the latter portion of it was, in view of the evidence introduced by appellant as to the general expenses of running the mine and conducting the business of the company, calculated to mislead the jury.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Livingston v. Rawyards Coal Co.*, House of Lords, Feb. 13, 1880, 42 L. T. (N. S.) 334, it was held that where the owner of coal mines innocently and ignorantly worked the coal beyond his boundary, the measure of damages is the actual value of the coal so worked to the true owner, taking into consideration all the circumstances of the case, in addition to any surface damage there may be. Lord Chancellor CAIRNS said: "There is absent here the element of any willful trespass, or willful taking of coal which the person taking it knew did not belong to him. What was done was done in perfect ignorance, and there was no bad faith or sinister intention in that which was done." "The value is that which he could have obtained from somebody else who would have come and taken the coal as it stood *in situ*, and would have worked it and turned it to account." Lord HATHERLEY said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of property, and because it is underground, is probably for some time not detected, the court of equity in this country will struggle, or I would rather say will assert its authority, to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement, or if, as in the present case, they had been the one working, and the other permitting the working through a mistake." In such case "the owner shall

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be repossessed, as far as possible, of that which was his property, and in respect of that which has been destroyed or removed, or sold, or disposed of, and cannot therefore be restored in specie, there shall be such compensation made to him as will in fairness between both parties give to the one party the whole of that which was his, or the whole value of that which was his, and will at the same time give to the other, in calculating that value, just allowances for all those outlays which he would have been obliged to make if he had been entering into a contract for that being done which has by misfortune and inadvertence on both sides, and through no fault, been done." "When once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie." Lord BLACKBURN said: "There was a technical rule in the English courts in these matters; when something that is part of the realty is severed from the realty and converted into a chattel, then instantly on its becoming a chattel it becomes the property of the person who was the owner of the fee in the land while it remained a portion of the land; and then in estimating the damage against a person who had carried away that chattel, it was considered and decided that the owner of the fee was to be paid the value of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrong-doer any thing for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do. Such was the rule of the common law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a long while ago PARK, B., put this qualification on it, as far as I am aware, for the first time. He said, if the wrong-doer has taken it perfectly innocently and ignorantly, without any negligence, and so forth, and the jury in estimating the damages are convinced of that, then you should consider the mischief that has been really done to the plaintiff who lost it while it was part of the rock; and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrong-doer had bought it while it was yet a portion of the land, as you would buy a coal-field. *Wood v. Morewood*, 3 Q. B. 440. That was the rule to be applied where it was an innocent person that did the wrong; that was the rule followed in the case of *Jegon v. Vivian*, L. R., 6 Ch. 742, which has been so much mentioned. It was followed in the Court of Chancery, and so far as I know, it has never been questioned since, that where there is an innocent wrong-doing the point that is to be made out of the damages is, as was expressed in the minutes of the decree: 'The defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district.'" To the same effect, *Waters v. Stevenson*, 18 Nev. 157; s. c., 29 Am. Rep. 293; *Railway Co. v. Hutchins*, 32 Ohio St. 571; s. c., 30 Am. Rep. 629; but contra, *Illinois, etc., R. & Coal Co. v. Ogle*, 82 Ill. 627; s. c., 25 Am. Rep. 342; *Barton Coal Co. v. Cox*, 39 Md. 1. The *Ogle* case came up again and the former decision was reiterated in 92 Ill. 353, and the doctrine of the *Cox* case was reaffirmed in *Franklin Coal Co. McMillan*, post. For a review of the authorities, see note, 26 Am. Rep. 525. But in case of labor bestowed by mistake on another's property no action can be maintained against the owner for such labor. *Isle Royal Mining Co. v. Hertin*, 37 Mich. 332; s. c., 25 Am. Rep. 530.

CHICAGO AND ALTON RAILROAD CO. V. ERICKSON.

(91 Ill 613.)

Carrier — constitutional law — refusal to receive cattle for transportation — unconstitutional statute.

A railroad company is not excused from receiving and transporting cattle by reason of a statute prohibiting such transportation, which is unconstitutional, although not so declared at the time of such refusal.

ACTION of damages for failure to transport cattle. The opinion states the facts. The plaintiff had judgment below.

Hay, Green & Littler, for appellant.

Scholes & Mather, for appellee.

SCHOLFIELD, J. This was an action on the case, by appellee, against appellant, in the Circuit Court of Sangamon county, for damages sustained by appellee in consequence of appellant's failure, as a common carrier, to promptly receive and transport forty-two head of cattle from Venice station, near St. Louis to Springfield, Illinois.

The following statement, taken from the brief of the counsel for appellant, sufficiently presents the material facts :

“On the afternoon of Thursday, the 27th day of May, 1875, the cattle in question were brought across the Mississippi river at the upper or Madison county ferry, above St. Louis, in the cars of the Kansas City & Northern Railroad Company, and on the transfer boats of the ferry. They were landed at Venice, a station of the Chicago and Alton railroad, situated at the terminus of the ferry. While the cattle were yet in the cars of the Kansas City and Northern Railroad Company, the young man in charge (Erickson, plaintiff) offered the cattle to the station agent of defendant below, for shipment to Springfield, Illinois. The agent of defendant declined to receive and ship the cattle, assigning as reasons that they were Cherokee cattle, and that under the instructions of his superior officers, he could not receive them. This agent, however, referred the matter to his immediate superior, Mr. Lake,

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whose head-quarters were at East St. Louis. Lake was telegraphed to come to Venice the same afternoon, but did not receive the dispatch till the next day. In the mean time the cattle were unloaded in the yards of the National Stock Yards Company, on the Illinois side of the river. The next morning Mr. Lake went to Venice, and after looking at the cattle and talking with Erickson about them, declined to receive them, for the same reasons given by the local agent, Nesbitt. Whereupon the cattle were taken back across the river and put into the Union Stock Yards, where they remained until the following Monday afternoon. On that afternoon the agents of the railroad company, under special instructions telegraphed from their superior officers in Chicago, forwarded the cattle to Springfield."

The damages claimed are such as resulted from the deterioration of the cattle between the time when they were offered for shipment and the time when they were received and shipped.

That appellant was bound to receive and carry the cattle, when they were first offered for shipment, unless it had a reasonable excuse for its refusal, is conceded by appellant's counsel; but they contend that it had such reasonable excuse for its refusal. They insist that the evidence shows that these cattle were "Texas or Cherokee cattle," and that under the circumstances in proof, appellant was justified, by the provisions of the act in relation to "Texas or Cherokee cattle" (Rev. Stats. 1874, 141-144), in refusing to receive and ship them — at least for the length of time it did so refuse.

If we were authorized to regard the provisions of the act referred to as valid law, it may be conceded the position of the counsel would be tenable and conclusive against the right of recovery by appellee, and were we permitted to adhere to our own views of the validity of this act, such would necessarily be our ruling. *Yeazel v. Alexander*, 58 Ill. 254; *Chicago & Alton Railroad Co. v. Gasaway*, 71 id. 570.

But the Supreme Court of the United States, in *Railroad Company v. Husen*, 95 U. S. 465, have held that an analogous act of the legislature of Missouri is unconstitutional and void, because in conflict with that clause of section 8, article 1 of the Constitution of the United States which provides that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

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The suit there was brought in the Circuit Court of the State, against the carrier, for bringing "Texas, Mexican or Indian cattle" into the State, in violation of the statute which prohibited their importation except at certain seasons and under certain restrictions, and a recovery was had for the resulting damage to the plaintiff's property. An appeal was prosecuted from the judgment of the Circuit Court to the Supreme Court of the State. In that court the validity of the statute was sustained, but a writ of error was sued out of the Supreme Court of the United States to the Supreme Court of the State, on the judgment, and the judgment was by that court reversed.

An examination of the acts of Missouri and of this State will disclose that, so far as the principles controlling or affecting the decision of the Supreme Court of the United States are concerned, there is no substantial difference between the acts. This is expressly recognized by the judge pronouncing the opinion of the court in the *Husen* case, who, after referring to *Yeazel v. Alexander, supra*, says the court cannot concur with the ruling in that case.

This question is one upon which the decision of the Supreme Court of the United States is paramount, and we are in duty bound to follow its rulings, however much we may in opinion disagree with them.

We have at the present term followed the decision in *Husen's* case. *Salzenstein v. Mavis*, 91 Ill. 391.

The act, being void for repugnancy to the Constitution of the United States, can neither be regarded as imposing obligations nor affording protection.

There being no reasonable excuse, in legal contemplation, shown for the refusal to carry, the judgment below must be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY CO. V. BROWN.

(67 Ind. 45.)

Constitutional law — nuisance — sounding steam whistle.

The legislature may for the public good require what otherwise would be a public nuisance ; and so a law requiring railway companies to sound a steam whistle on the approach of a locomotive to a public highway crossing is constitutional.

ACTION for injunction. The opinion states the facts. The plaintiff had judgment below.

N. O. Ross, for appellant.

J. W. Youch, for appellee.

WORDEN, C. J. The appellant seemed to have been causing the whistles of its engines to be sounded in accordance with the act of March 29th, 1879 (Acts 1879, p. 173) ; whereupon the appellee commenced this action, in the court below, to enjoin it from so doing, on the ground that so much whistling constituted a nuisance. Such proceedings were had as that final judgment was rendered in favor of the plaintiff, perpetually enjoining the defendant from sounding its whistles except to give one or more short, full and distinct when approaching a highway crossing, and except such sounds whistling as may be necessary and customary in signalling for breaks, switches, side tracks or danger.

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The appellant has properly preserved the questions involved, and has appealed to this court.

The appellant, we infer, though it is not so stated in the brief, would be willing to submit to and obey the injunction, if it would be any defense to prosecutions for failing to comply with the requirements of the statute mentioned. But as the judgment can be operative only between the parties to it, the appellant we infer, in order to avoid liability to attachment on the one hand, or to prosecution for failing to comply with the statute on the other, has appealed.

The first section of the statute cited is as follows:

“Be it enacted,” etc., “That it shall be the duty of all railroad companies, operating in this State, to have attached to each and every locomotive engine a whistle, such as is now in use or may be hereafter used by all well-managed railroad companies, and the engineers or other persons in charge of, or operating such engine upon the line of any such railroad, shall, when such engine approaches the crossing of any turnpike or other public highway in this State, and when such engine is not less than eighty, nor more than one hundred rods from such crossing, sound the whistle on such engine attached thereto, continuously, from the time of sounding such whistle until such engine shall have fully passed such crossing: Provided, that nothing herein shall be so construed as to interfere with any ordinance that has been, or may hereafter be passed by any city in this State regulating the management or running of such engine or railroad within the limits of such city.”

The residue of the statute provides penalties and liabilities for failure to comply with the requirements of the section above set out.

If this statute is valid, there was no ground for the injunction. The appellant could not be legally enjoined from doing that which the legislature by a valid enactment required to be done.

We have no brief for the appellee, and are therefore not advised, further than may be gathered from the brief of the appellant, upon what ground the statute was held void by the court below.

Viewed merely as an infringement upon the chartered rights of railroad companies, the statute is clearly valid.

It is a police regulation clearly within the scope of legislative authority. It was designed, doubtless, to make the operation of railroads more safe, not only to persons upon the trains, but to per-

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sous passing upon highways crossed by railroads. It was designed, in short, to protect human life. It was quite as much within the power of the legislature as the act requiring railroad companies to pay for stock killed upon their roads, the same not being fenced; or the act requiring trains to come to a full stop before crossing the track of other railroads. These are police regulations, in the language of Judge REDFIELD, "of the importance or necessity of which the legislature must be the judge." 2 Redf. on Railways, 461.

But it may be said that the constant whistling required by the act is a nuisance. To this it may be successfully answered, that the legislature may, when deemed necessary for the public good, permit or require that to be done which would, on common-law principles and without the statute, be deemed a nuisance. Indeed, the operation of railroads might, in many instances, without legislative sanction, be in itself a nuisance; as in running through one's farm and frightening stock, in running near highways and frightening teams upon the road, or in running through populous towns or cities. But having legislative sanction, such operation is not a legal nuisance. "That which would otherwise be a nuisance, if done under the authority of law for the public good, is justifiable." 2 Redf. on Railways, 408.

It cannot be doubted that the legislature had the power to require railroad companies to sound their whistles upon approaching highway crossings. This would be so clearly a regulation for the public good, intended to prevent collisions and the sacrifice of human life, that we suppose the legislative power to enact such law could hardly be called in question.

It is equally clear that the legislature must be the exclusive judge as to the distance from the crossing at which the whistle should be sounded, and as to the necessity of a continuous sounding until the crossing is passed.

The necessity and propriety of the enactment in question were exclusively for the legislature, and not for the courts, to pass upon. If the law is unconstitutional, the courts should hold it void, but upon no other ground can it be disregarded. See *Welling v. Merrill*, 52 Ind. 350.

The law in question is not unconstitutional, and the judgment below must be reversed.

The judgment below is reversed, with costs.

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MCCLOSKEY V. INDIANAPOLIS MANUFACTURERS AND CARPENTERS' UNION.

(67 Ind. 86.)

Negotiable instruments — surety as apparent principal — liability to pay when time extended.

One who executes a note, apparently as principal but really as surety, cannot avoid liability to the payee, who was ignorant of the true relation, by reason of the agreement of the surety with the principal for extension of the time of payment. (*See note, p. 79.*)

D. V. Burns and C. S. Denny, for appellant.

H. Dailey and W. N. Pickerill, for appellees.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Howk, J. In this action, the appellees, the Indianapolis Manufacturers and Carpenters' Union, sued the appellant and one Michael McBride upon a promissory note, of which the following is a copy :

“\$1,000.

INDIANAPOLIS, *February 11th*, 1876.

“On or before twelve months after date, we promise to pay to the order of Indianapolis Manufacturers and Carpenters' Union, at Harrisons' Bank, at Indianapolis, Indiana, one thousand dollars, value received, without any relief from valuation or appraisement laws, and attorney's fees, with ten per cent interest from date. The drawers and indorsers severally waived presentment for payment, protest and notice of protest and non-payment of this note.

(Signed)

“MICHAEL MCBRIDE,
“JOHN MCCLOSKEY.”

Which note was indorsed as follows : “Interest for 6 months paid on this note, \$50, paid Sept. 2d, 1876,” and “Rec'd March 1st, 1877, sixty dollars, as interest on this note.”

To this complaint on said note, the appellant, for his separate answer, alleged, in substance, that he admitted the execution of the note in suit, but he said that he signed the same as the surety of

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his co-defendant, Michael McBride, who was the principal therein: that on the 2d day of September, 1876, said McBride paid fifty dollars as interest on said note, and on March 1st, 1877, the further sum of sixty dollars, also as interest thereon; that at the time of said last payment, it was agreed by and between the plaintiff's agent and general superintendent and said McBride, that in consideration of the payment by said McBride of said sum of sixty dollars, as interest on said note, the time of the payment of the principal of said note should be and was extended until the 1st day of April, 1877, and that said agreement was made by the plaintiff and said McBride, without the appellant's knowledge or consent. Wherefore, etc.

The plaintiff replied, by a general denial, to the appellant's answer.

The issues joined between the appellant and the plaintiff were tried by the court at Special Term, and a finding was made for the plaintiff, against the appellant, for the amount due on the note in suit. The appellant's motion for a new trial was overruled, and to this ruling he excepted; and judgment was rendered by the court, at Special Term, upon its finding, and the appellant, McCloskey, appealed therefrom to the court in General Term.

On that appeal, the judgment of the Special Term was affirmed by the court in General Term; and to this judgment of affirmance the appellant excepted and appealed therefrom to this court.

The appellant has here assigned, as error, the judgment of the court in General Term, and has thereby brought the error there assigned by him, before this court. The only error assigned by the appellant, in the court below in General Term, was the overruling of his motion for a new trial; and the only cause assigned by him for such new trial, in his motion therefor, was that the finding of the court was "contrary to the evidence."

It will be seen from the copy of the note in suit, set out in this opinion, that it was the joint note of the appellant and his co-defendant, McBride; and that the fact, if such were the fact, that the appellant was the surety only of his co-defendant, in the note sued on, was not apparent on the face of the note. The appellant and McBride were apparently joint makers of the note in suit. It will be observed, also, from the appellant's separate answer, in this case, the substance of which we have given in this opinion, that it was not alleged therein that the plaintiff below had notice or knowl-

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edge of the fact, if such were the fact, that the appellant was a surety only in the note sued on, at the time of its alleged agreement with said McBride for an extension of the time of payment of the principal of said note.

In the recent case of *Davenport v. King*, 63 Ind. 64, which was an action upon a note made by two persons, where, as in this case, both the makers of the note were apparently principals therein, it was held by this court, that to maintain the defense of suretyship and the discharge of the surety by an extension of time to the alleged principal, against the plaintiff, the defendants must allege and prove that the plaintiff had notice that he was surety in the note sued on, at the time he made the agreement with the other maker of the note to give further time for its payment. *Neel v. Harding*, 2 Metc. (Ky.) 247; and Brandt on Suretyship and Guaranty, § 17, and notes.

It is certain, therefore, we think, that the appellant's separate answer in this case did not state facts sufficient to constitute a defense to the plaintiff's action, and that a demurrer thereto for the want of facts, if it had been filed, would have been correctly sustained. It may be said, however, that because no demurrer was filed to the appellant's answer, but issue was joined thereon by a reply in general denial, and because, on the trial, the allegations of this insufficient answer were sustained by the evidence, conceding such to be the fact, therefore the finding of the court ought to have been for the appellant. It has been held otherwise by this court, and we think correctly so.

In the case of *Western Union Telegraph Co. v. Fenton*, 52 Ind. 1, it was held that where a paragraph of answer in confession and avoidance is bad, and no demurrer thereto is filed, but issue is joined thereon, and upon the trial, its allegations are proved to be true, it does not follow that the finding should be for the defendant, but such immaterial issue should be disregarded. The reason assigned for this decision, in the opinion in the case cited, is, that upon the pleadings the plaintiff is entitled to judgment, under the provisions of section 372 of the Practice Act, which reads as follows: "Where upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." 2 R. S. 1876, p. 186.

The case last cited was approved and followed by this court, on

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the point now under consideration, in the case of *Dorman v. State*, 56 Ind. 454.

It seems to us, therefore, that even if the evidence on the trial fully sustained the appellant's separate answer, as his counsel earnestly insist, in the case at bar, still it was the duty of the court below, at Special Term, to disregard the issue joined on said answer, and find for the plaintiff below, upon the pleadings in the case, and render judgment accordingly. The judgment thus rendered was, we think, correctly affirmed by the court in General Term, upon the error there assigned.

We find no error in the record which justifies a reversal of the judgment of affirmance.

The judgment of the court in General Term is affirmed, at the appellant's costs.

NOTE BY THE REPORTER.— Brandt on Suretyship and Guaranty, § 17, says of a case like the principal one: "But it must appear that the creditor, at the time the act complained of was done, knew of the fact of suretyship. The great weight of authority and of reason is in favor of the law as above stated." Citing *Neel v. Harding*, 2 Metc. (Ky.) 247; *Orvis v. Newell*, 17 Conn. 99; *Wilson v. Foot*, 11 Metc. 285; *Murray v. Gardner*, 29 Iowa, 520. See, to same effect, *Howell v. Lawrenceville Manufacturing Co.*, 31 Ga. 663; *Nichols v. Parsons*, 6 N. H. 80; *Deberry v. Adams*, 9 Yerg. 52.

LINDEMAN V. ROSENFELD.

(67 Ind. 246.)

Surety — extension of time of payment — taking promissory note.

In an action on a bond, executed by principal and surety, for the faithful accounting by the principal for the obligee's moneys received by him as agent, the surety answered, alleging that on a settlement between the principal and obligee, the former executed to the latter a note for the amount found due, payable at a future day, but did not allege any agreement for extension of the time of payment of the bond, nor that the note was negotiable. *Held*, no defense. (*See note*, p. 85.)

ACTION on a bond. The opinion states the facts. The plaintiff had judgment below.

Howk, J. This was a suit by the appellee, against the appellant, and one Edward D. Scudder, upon a certain writing obligatory, of which the following is a copy.

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“ Know all men by these presents, that we, Edward D. Scudder and Frank Lindeman, are each held and firmly bound unto Emanuel Rosenfield in the sum of one hundred dollars, for the payment of which we each severally bind ourselves, our heirs and executors, upon the conditions following, to wit: Whereas the said Edward D. Scudder has this day been appointed by said Rosenfield an agent for The North American Attorneys' and Tradesmen's Protection Union Company, for the purpose of soliciting the subscription of members to said company. Now, if said Scudder shall faithfully report to said Rosenfield all subscriptions taken by him to said company, shall not take any member into said company, for less than three dollars per member, and shall pay over to said Rosenfield all moneys received by him, as such agent for said company, except the sum of one dollar and twenty-five cents for each subscriber he may procure to said company, which he shall retain as his commission, and at the termination of his said agency for said company shall faithfully pay over to said Rosenfield all moneys due from him to said Rosenfield as well as deliver up to said Rosenfield all books, blanks, papers, goods and property, of any kind whatsoever, then remaining in his hands and belonging to said Rosenfield, then his bond shall be of no effect, otherwise to be and remain in full force; all moneys collected on this bond shall be collected without relief from valuation or appraisement laws. Signed this 7th day of June A. D. 1875.

(Signed)

E. D. SCUDDER. [Seal.]

“ FRANK LINDEMAN. [Seal.] ”

In his complaint on said bond, the appellee alleged that the defendant Scudder acted as the appellee's agent, in the business mentioned in said bond, from the 7th day of June, 1875, until the 26th day of September, 1875; that during that time and while acting as such agent, the defendant Scudder received large sums of money amounting in the aggregate to one hundred and twenty-five dollars, which he embezzled and converted to his own use, and for which he had failed and refused to account to the appellee at the expiration of his agency, or at any time since; that the defendant Scudder had also failed and refused to return to the appellee, or in any way to account for, ten certificates of membership in said association, of the value of twenty-five dollars, placed in his hands by the appellee, and had converted the same to his own use. Wherefore, etc.

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The defendant Scudder and the appellant, Lindeman, served in their defense, and the appellant separately answered in six paragraphs, of which the first was a general denial, and each of the other five paragraphs stated affirmative or special matter, by way of defense. To each of the second, fourth, fifth and sixth paragraphs of the appellant's answer, the appellee demurred for the alleged insufficiency of the facts therein to constitute a defense to his action, which demurrers were sustained as to the second, fourth and sixth paragraphs, and overruled as to the fifth paragraph of the answer, and to this latter ruling the appellee excepted.

To the fifth paragraph of the appellant's answer, the appellee then replied in a single paragraph, setting up affirmative or special matter; and to this reply the appellant's demurrer, for the want of sufficient facts, was sustained by the court, and the appellee excepted to this decision. The appellant, Lindeman, had judgment for his costs, on this demurrer, in the court below, at special term.

Upon the issues joined on the separate answer of the defendant Scudder, the cause was tried by the court at Special Term, and a finding was made and judgment was rendered in favor of the appellee, and against the said Scudder, for one hundred dollars and costs.

From the judgment of the court at Special Term, in favor of the appellant, Lindeman, the appellee, Rosenfield, appealed to the court in General Term, and there assigned, as errors, the overruling of his demurrer to the fifth paragraph of the answer of the appellant, Lindeman, and the sustaining of Lindeman's demurrer to the appellee's reply to said fifth paragraph of Lindeman's answer. Upon these alleged errors, the court in General Term reversed the judgment of the Special Term, and remanded the cause for further proceedings.

From this judgment of reversal, the appellant, Lindeman, has appealed to this court, and has here assigned, as error, the judgment of the court below in General Term. This assignment of error brings before this court the same alleged errors, which were assigned by the appellee in the court below in General Term. By this assignment of errors, two questions are presented for our decision, which may be thus stated:

1. Are the facts stated in the fifth paragraph of the appellant's answer sufficient to constitute a good defense to the appellee's action?

2. Are the facts stated in the appellee's reply to the fifth paragraph of the appellant's answer sufficient to constitute a good reply to said paragraph of answer?

If the latter or both of these questions must be answered in the affirmative, it is very clear that the judgment of the court, in General Term, must be affirmed; and it is equally clear, we think, that if the former question must be answered in the affirmative, and the latter question in the negative, the judgment of the General Term must be reversed. We will consider and decide these two questions in the same order in which we have numbered and stated them.

1. In the fifth paragraph of his separate answer the appellant, Lindeman, alleged, in substance, that he executed the bond in suit, as surety for the defendant Edward D. Scudder, and not as principal, of which the appellant had notice at the time it was executed; that afterward, to wit, December 25th, 1875, the appellee and said Scudder met, and had and made a final settlement of and concerning the matters and things contained in said bond; that said Scudder accounted to the appellee for and concerning such matters and things, and there was found due to appellee the sum of ninety-two dollars and — cents, which — cents said Scudder then paid appellee, and executed and delivered to appellee for the balance, said ninety-two dollars, his, said Scudder's, individual note, payable at a future day, to wit, forty days after date, without the appellant's knowledge or consent.

It seems to us that this paragraph of answer did not state facts sufficient to constitute a defense for the appellant, Lindeman, on the bond in suit. It was not alleged in this paragraph that the note executed by the defendant Scudder, to the appellee, for the balance found due him upon their accounting and settlement, was made payable at a bank in this State. In the absence of such an allegation, it must be presumed, as against the appellant, that the note was not made payable at such a bank. Therefore the note was not negotiable by the law merchant, as an inland bill of exchange; and it did not operate as a *prima facie* payment or extinguishment of the original indebtedness, for which it was alleged to have been executed. It is the law of this State, established and settled by the decisions of this court in an unbroken line, that the execution of a promissory note not payable at a bank in this State and not governed by the law merchant, given for a precedent debt

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will not operate as a payment or in extinguishment of the original indebtedness, in the absence of an express stipulation or agreement to that effect, by and between the parties. *Tyner v. Stoops*, 11 Ind. 22; *Stevens v. Anderson*, 30 id. 391; *Maxwell v. Day*, 45 id. 509; *Alford v. Baker*, 53 id. 279; *Hill v. Sleeper*, 58 id. 221; *The Bristol Milling, etc., Co. v. Probasco*, 64 id. 406.

In the fifth paragraph of the appellant's answer it was not alleged that there was any stipulation or agreement, by and between the appellee and the defendant Scudder, that the latter's individual note, described in said paragraph, should be or was executed as a payment or in extinguishment of the original indebtedness, the payment of which was secured to the appellee by the bond in suit. We may well conclude, therefore, that the fifth paragraph of answer did not show by its averments that the original indebtedness of the defendant Scudder, secured by said bond, had been paid or extinguished by his individual note, as the same was described in said paragraph.

The facts alleged by the appellant in this fifth paragraph of answer were not sufficient, we think, to show that he had been or was discharged from liability on the bond in suit, as surety therein. The law may be regarded as settled in this State, that "an agreement between the payee or holder of a note and the principal therein, for an extension of the time of payment for a fixed and definite period, made without the knowledge or consent of the surety in the note, and founded upon a new consideration, will discharge the surety from any liability on such note." *Huff v. Cole*, 45 Ind. 300; *White v. Whitney*, 51 id. 124; *Bucklen v. Huff*, 53 id. 474; and *Buck v. Smiley*, 64 id. 431. We know of no reason why this doctrine should not be applicable as well to such bonds as the one sued on in this action, as to promissory notes. Indeed, in the case of *Douglass v. State*, 44 Ind. 67, which was a suit upon a guardian's bond, it was impliedly held by this court, that in a proper case, this doctrine, in relation to the discharge of a surety on a promissory note, would be extended and made applicable to the discharge of sureties in penal bonds, similar to the bond now in suit. See, also, on this point, the case of *Gahn v. Niemcewicz*, 11 Wend. 312, and *Halliday v. Hart*, 30 N. Y. 474.

In this regard, however, the fifth paragraph of the appellant's answer, in the case at bar, is fatally defective on the appellee's demurrer thereto, as it seems to us, for the reason that it failed to

allege that the appellee, the obligee or payee of the bond in suit, had ever agreed to or with the defendant Scudder, the principal obligor in said bond, for any extension of the time of payment of the bond, or of the indebtedness secured thereby; and for the further reason that it was not alleged therein that there was any new consideration whatever for any such agreement. It did not appear, from the allegations of this paragraph, that there had been any dispute or controversy between the defendant Scudder and the appellee, or that the note described had been given as the result of any compromise, or upon the faith of any agreement by the appellee that he would forbear to sue on the bond, during the time or before the maturity of said note. For aught that was alleged in said fifth paragraph of answer, it may well be said, we think, that the note described therein was a mere memorandum of the amount found due the appellee, and the naked promise of the defendant Scudder, that he would pay in forty days, without interest, just the sum, and no more, which he and the appellant were already bound to pay by the bond now in suit. In the case of *Abel v. Alexander*, 45 Ind. 523; s. c., 15 Am. Rep. 270, it was held by this court that an agreement by the principal to continue to pay the same rate of interest specified in a promissory note, though greater than the legal rate, was not a sufficient consideration to sustain a promise to extend the time of payment, and that an extension upon such consideration, without the knowledge or consent of the surety, would not discharge such surety from liability. It seems to us that the doctrine of the case last cited is directly applicable to the case made by the allegations of the fifth paragraph of the appellant's answer. *Braman v. Hawk*, 1 Blackf. 392; *Naylor v. Moody*, 3 id. 92; *Coman v. State*, 4 id. 241; and *Harter v. Moore*, 5 id. 367.

We are clearly of the opinion that the fifth paragraph of the appellant's answer did not, in any view of it, state facts sufficient to constitute a defense to the appellee's action, and that the demurrer thereto ought to have been sustained.

[Omitting the other point.]

In our opinion, the court below in General Term did not err, in this case, in reversing the judgment of the Special Term.

The judgment of the court, in General Term, is affirmed, at the appellant's costs.

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NOTE BY THE REPORTER.—In *Gahn v. Niemcewicz*, 11 Wend. 812, where interest had accumulated on the bond of a principal debtor, secured by the mortgage of a surety, and the creditor accepted the *non-negotiable* promissory note of the principal debtor for such interest, payable in thirty days; *held*, that the surety was not discharged, because, 1, there was no agreement to give time; 2, such agreement could not be implied; 3, the agreement, if any, was invalid for want of consideration; 4, the surety was not prevented from enforcing the bond and mortgage for the principal sum, before the interest could become on the note. NELSON, J. said: "but assuming that this note is valid and binding upon the parties, there is another view of the case equally decisive for the respondents. At most, it can be viewed only in the character of a new security for the debt, inferior to the one already held, both in its nature as a simple contract, and as to parties, and therefore cannot operate to extinguish it without an actual agreement to that effect, and is only a new or collateral security." Even taking a higher security would not alter the result without an agreement for time. *Twopenny v. Young*, 3 B. & C. 208; *Ewes v. Widowson*, 4 C. & P. 151; *Pring v. Clarkson*, 1 B. & C. 14. "The time when the new security becomes due does not vary the effect and operation of it upon the old, as abundantly appears from the above cases. All of them became due or could not be enforced until some time after they were taken; but this circumstance implied no agreement to postpone the remedy upon the old security. Those cases all turned upon the point that no agreement had been made to forbear, in consideration of the new security at the time it was received, and that the mere receipt of it did not imply one."

But the law is different where the note is negotiable. Thus, in *Brant on Suretyship and Guaranty*, section 317, it is said: "If the debt for which the surety is bound, is evidenced by a bond or other sealed instrument, and the creditor take from the principal, for the debt, a note, bill, or other *negotiable* instrument, which falls due after the original obligation matures, this usually amounts to an extension of time and discharges the surety." Citing *Armistead v. Ward*, 2 Patton, Jr., & Heath. (Va.) 504; *Clarke v. Henty*, 3 Y. & C. 187; *Hooker v. Gamble*, 12 Up. Ca. C. P. R. 512; *Id.*, 9 id. 484; *Smith v. Crease's Ex'rs*, 2 Cr. C. C. 481; *Bangs v. Mosher*, 23 Barb. 478; *Rees v. Berrington*, 2 Ves. Jr. 540; *Appleton v. Parker*, 13 Gray, 178; *Weed Sewing Machine Co. v. Oberreich*, 38 Wis. 325.

In *Armistead v. Ward*, 2 Patton & Heath, 504, the court said: "Numerous cases might be cited to show that securities of a particular character, such as bills of exchange and promissory notes of the kind negotiable like bills of exchange, imply an agreement to suspend the enforcement of the demand on account of which they are taken, and carry with them a sufficient consideration to support it. If this were not so, the creditor who took the additional security in the form of a note or bill, might, in consequence of the negotiable character of the latter, by negotiating it, subject the debts, to the payment of both the old and the new security. Therefore it is well settled, that taking a bill or note on account of a debt is *prima facie*, if not an absolute, suspension of the debt, and consequently an absolute discharge of all parties whose liability for its payment is merely that of sureties or guarantors. *Okie v. Spencer*, 2 Whart. 253; *Fillons v. Prentiss*, 3 Den. 512. In the two cases last cited, and the case of *Walton v. Marcell*, 13 M. & W. 452, it was held that the execution of such a security, on account of an existing debt, created an absolute and conclusive presumption—a presumption of law which could not be controverted—whilst others, perhaps with better reasons have held that it was a question of intention, and that the suspension of the debt and consequent discharge of the surety depend on the understanding of the parties at the time when the security is given. And though, in the case of *Elwood v. Diefsendorf*, 5 Barb. 398, it seems to have been considered that the *prima facie* effect of taking a note payable at a future day, on account of a pre-existing debt, is merely to create a collateral security for the debt and not to suspend it, and will not therefore operate a discharge of the surety without an express agreement for forbearance; yet I consider it the better opinion, and sustained by the general warrant of authority, that the debt will be suspended unless there is evidence that the understanding and agreement of the parties was that it should not."

In *Clarke v. Henty*, 3 Y. & C. 187, a new bond was taken for the amount due on an old one, proceedings having been commenced on the old one, and the old one being retained. *Held*, a discharge of the surety, as the new one must be presumed a satisfaction of the old.

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Hooker v. Gamble supports Mr. Brant's proposition; and so of *Rees v. Berrington*, *Appleton v. Parker*, and *Weed Sewing Machine Co. v. Oberreich*. The latter is exactly in point, as the question arose on the pleadings.

In *Smith v. Crease's Ex'rs*, a bond was given for bills. There was, however, evidence of "an understanding that" the creditor "was not to trouble the principal for the money unless the new security should prove to be good for nothing." The court did say: "Can it be supposed for a moment, that it was not understood between the parties that Crease should at least indulge Mount on the bills, until Bronaugh's bond should become due, so that it might be ascertained whether that obligation would be paid or not?"

Bangs v. Mosher was exactly like the principal case except that the draft given for the bond debt; the court said: "It was *sub modo* a payment, and the insurance company could afterward call on the drawer until after he had made default in the payment of the draft."

ARBINTRODE V. STATE.

(67 Ind. 267.)

Criminal law — indictment for unlawful sale of liquor — allegation of quantity.

A statute prohibited the sale of intoxicating liquors to minors in quantities less than a quart. An indictment, alleged the sale of "one gill." *Held*, bad. (See note, p. 88.)

CONVICTION of unlawfully selling intoxicating liquor. The opinion states the case.

L. P. Milligan and *A. Moore*, for appellant.

T. W. Woollen, attorney-general for the State.

WORDEN, J. An indictment, properly found in the court below, charged, that the appellant, "on," etc., "at," etc., "did then and there unlawfully sell intoxicating liquor, to wit, one gill to one Franklin Churchill, at and for the price of five cents; he, the said Franklin Churchill, being then and there a person under the age of twenty-one years," etc.

The appellant pleaded guilty to the indictment, and was fined. He has appealed and assigned for error, in substance, that the facts alleged in the indictment do not constitute an offense.

If it be true that the facts alleged do not constitute an offense, the appellant has lost nothing by pleading guilty to the indictment. He may appeal and attack the indictment, for the first time, in this court. *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 id. 242.

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We proceed then to inquire whether the facts stated constitute a case.

In the case of *State v. Zeitler*, 63 Ind. 441, it was held not to be unlawful to sell intoxicating liquor to a minor, an intoxicated person, or any other person, unless the sale was by a less quantity than a quart at a time. Clearly, it was not the intention of the statute to prevent a minor from trafficking in intoxicating liquors by the purchase and sale thereof in large quantities.

Taking it as settled that in order to make such sale to a minor an offense, it must appear that a quantity sold was less than a quart, the question arises whether it is shown by the indictment in the case before us that the quantity sold by the appellant was less than a quart.

The indictment need not allege the specific quantity sold, if it show that the quantity was less than a quart. *State v. Jacks*, 54 Ind. 412; Moore's Crim. Law, 876, note 1. In this case, the indictment alleges that the defendant "did then and there unlawfully sell intoxicating liquor, to wit, one gill," etc. It is not alleged that the quantity sold was less than a quart, nor that the defendant sold the gill and no more.

The question is not whether the courts will take notice of the standards of measure, and therefore that a gill is less than a quart; but whether the courts will or can legally assume that because the appellant sold a gill, he did not sell any more at the same time, and therefore that he committed an offense. This would be assuming what is not charged in the indictment, and making out an offense by an unauthorized inference. If all the facts charged in the indictment may be true, and yet the defendant be guilty of no offense, the indictment must be insufficient.

It may be true that the appellant sold the gill of intoxicating liquor, and yet he may not have been guilty of any offense, because the gill may have been but a part of a larger quantity sold. The fallacy of the contrary view lies in assuming that because the appellant sold a gill, he did not sell a larger quantity at the same time. If the appellant had sold a gallon or a barrel, he would have been guilty of no offense whatever; and yet it would be true that he sold a gill. The question involved is not a new one in this court.

In the case of *Willard v. State*, 4 Ind. 407, it was held that an indictment charging that the defendant "unlawfully bartered and sold one pint of spirituous liquor," etc., was sufficient. But in the

case of *Struckman v. State*, 21 Ind. 160, the question was again considered, and it was decided that an indictment charging the sale of "one gill of intoxicating liquors" was insufficient as not showing the sale of a less quantity than a quart. The case was decided in part on general principles, and in part on the authority of the case of *Commonwealth v. Odlin*, 23 Pick. 275, which is exactly in point. The like decision was made in the case of *Wood v. State*, 21 Ind. 276.

In the case of *Reams v. State*, 23 Ind. 111, and *McCool v. State*, 23 id. 127, a different conclusion was reached. In each of those cases it was held that an indictment charging the sale of a pint was sufficient, as to the quantity sold.

In this diversity in the decisions of this court, we are at liberty to follow that line which seems to us to be most in harmony with general principles of law applicable to criminal proceedings. And we think that in accordance with those general principles, such indictment should show by its averments that the quantity of liquor sold was less than a quart, and not leave the matter to rest upon inference or conjecture.

We quote, in conclusion of this opinion, the following paragraph from the opinion of the court in the case above cited from 23 Pick. delivered by SHAW, C. J. In that case the law prohibited a sale of less than fifteen gallons, and the defendant was charged with having sold one pint. The court said :

"We do not consider that any particular form of words must be adopted ; but some words must be used, which do convey to the mind the idea of a sale under fifteen gallons. Were it said, 'less than fifteen gallons, to wit, one pint,' or 'one pint and no more,' or words equivalent, it would be sufficient. But simply averring, affirmatively, that the defendant did sell one pint, without some words negating a larger quantity, is not bringing the case within the statute."

In our opinion the indictment does not charge any offense.

The judgment below is reversed, and the cause remanded.

Judgment reversed.

NOTE BY THE REPORTER.—This decision has been greatly denounced in the newspapers, but it is good law. Wharton says (2 Crim. Law, § 1514), "When the statute prohibits sales of less than a particular measure, the indictment must aver the quantity sold to be less than such measure, in the statutory words. It will not be enough to aver simply a sale by a smaller measure. That is not enough to aver selling a 'pint,' when the statute makes illegal the selling of a less measure than a quart." The indictment must aver the selling

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of 'a less measure than a quart.' " Citing *Com. v. Odlin*, 23 Pick. 275; *State v. Shaw*, 2 Dev. 198.

In the latter case, the law prohibited retailing "by the small measure" "where the quantity is less than a quart," and the indictment simply alleged a sale "by the small measures." This case is therefore not analogous.

In *Willard v. State*, 4 Ind. 407, the court said: "A pint is a measure as well known as a quart. The one word is quite as definite as the other. An allegation that a pint is less than a quart could not be more explicit, and was therefore unnecessary. If in point of fact the party sold the pint, not separately, but as part and parcel of a quantity more than a quart, to the same person and at the same time, that was matter of evidence of which he could avail himself on the trial." In *Reams v. State*, 23 id. 111, the indictment was held good after verdict, on the ground indicated in the last sentence quoted from the *Willard* case; without much discussion, and without criticism of the *Odlin* case; and the court thought it good on motion to quash, relying on the statute which enacts that no indictment shall be quashed for any defect which does not tend to the prejudice of substantial rights on the merits. In *McCool v. State*, 23 Ind. 127, the court said: "The argument seems quite technical, and would require in criminal pleadings the highest degree of certainty known to the law. We apprehend that the court, in the case referred to in 23 Pick. 275, was governed by the common law rule requiring a greater degree of certainty in criminal pleadings than is required under the statutes of this State. The rule governing pleadings in civil cases requires that they shall be certain to a common intent; and as we understand the statute, it requires no greater degree of certainty in criminal than in civil pleadings." The statutory provisions in question are that words in indictments must be construed according to their usual acceptation in common language, that the indictment is sufficient if the offense is set forth in plain and concise language, and with such certainty that the court can pronounce judgment on conviction according to the right of the case. In *Struckman v. State*, 21 Ind. 160, the court said: "It is undoubtedly true that courts and juries may legally take notice of known and established measures of quantity; they may notice that a gill is less than a quart. But does the allegation bring the defendant within the prohibition? We think not. The gill sold may have been but part of a larger quantity, a quart or more. Suppose the defendant sold a quart, which he had a right to do without license, it would be true that he sold a gill, it would be true that he did just what the information charges him with doing." Quoting from the *Odlin* case, they continued: "If all the facts alleged in the indictment may be true, and yet the defendant not guilty, the indictment is insufficient." No reference is made to the statutes.

PERKINS V. STATE.

(37 Ind. 270.)

Criminal law — false pretenses — representation of power to arrest.

One who falsely represents himself to another as an officer having a warrant for the arrest of the other for forgery, and power to compromise the offense, and threatens to arrest him, and by means of such representation and threats obtains from him a valuable thing as a consideration for not making the arrest, is guilty of the crime of false pretenses. (See note, p. 94.)

CONVICTION of false pretenses. The opinion states the case.

A. E. Paige, S. O. Bayless and J. U. Gorman, for appellant.

T. W. Woollen, attorney-general, and *W. R. Moore*, prosecuting attorney for the State.

BIDDLE, J. The appellant and Lewis C. Baum were jointly indicted for obtaining money and a promissory note feloniously, by false pretenses.

The indictment contains three counts. The appellant was found guilty and sentenced to imprisonment in the State prison on the second count, which was tested in the court below by a motion to quash and a motion in arrest of judgment, and held good. The sufficiency of the second count of the indictment is the only point presented for our decision. The objections made to this count by the appellant are:

1. That the pretenses alleged are not such as would deceive a person of ordinary prudence and caution;

2. That the alleged false pretenses were made in reference to a future event, and not concerning an existing fact.

The crime is charged in the following words:

“That Thomas Perkins and Lewis C. Baum, on the 13th day of November, 1878, at the county of Clinton and State of Indiana, did then and there feloniously, with intent to cheat and defraud one Joseph Mink, did then and there unlawfully, feloniously, knowingly and designedly and falsely pretend and represent to said Joseph Mink, that they, Thomas Perkins and Lewis C. Baum were officers, to wit, State marshals and had a warrant for the arrest of him, the said Joseph Mink, for the crime of forgery, that is to say, that said Mink, on the 12th day of November, 1878, at the county of Clinton and State of Indiana, unlawfully and feloniously uttered and tendered in payment, to persons to the grand jurors unknown, a certain false, forged and counterfeit piece of silver coin in the resemblance and similitude of the silver coin of the United States of America, commonly called a half dollar, and at that time current in the State of Indiana, he, the said Joseph Mink, then and there knowing said false, forged and counterfeit piece of silver coin to be false, forged and counterfeit, with intent, then and there, to wit, on the 12th day of November, 1877, to defraud said person to the grand jurors unknown; that said Perkins and Baum then

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and there, to wit, on the 13th day of November, 1878, with intent to cheat and defraud said Mink, did unlawfully, feloniously and falsely pretend and represent to him that they had power and authority to arrest and imprison him for said crime; that they, as such officers, had the power to compromise said crime with him for money, and as such marshals, could compromise any crime in the State; and did then and there propose to said Joseph Mink, that if he, the said Mink, would pay and give to them the sum of fifteen dollars in money, and a note for seventy-five dollars, 'due in four months, with Charles Mink surety thereon, they would not arrest and imprison him, said Joseph Mink, for said alleged crime, and would settle and compromise said crime of forgery; that said Joseph Mink, believing said pretenses and representations, so made by Perkins and Baum, to be true, and believing that they were officers, to wit, State marshals, and believing that said defendants had come to arrest and imprison him, and believing they had power to arrest and imprison him, and also believing that they, as such officers, were authorized and had power to compromise and settle said alleged forgery, and being deceived thereby, was induced by reason thereof to deliver to said Perkins and Baum his moneys, goods and chattels, to wit, one bank-bill of the denomination and value of five dollars, and one bank-bill of the denomination and value of ten dollars (a more particular description of said bank-bills is to this grand jury unknown), and one promissory note due four months after date, with Charles Mink surety thereon, which said note is of the following tenor, to wit:

“‘\$75.00

FRANKFORT, *Nov. 13th*, 1868.

“‘Four months after date we promise to pay Thomas Perkins or order seventy-five $\frac{00}{100}$ dollars, with interest per cent, per annum, value received, without any relief from valuation or appraisment laws.

“‘JOSEPH MINK,

“‘CHARLES MINK.’

“Which said promissory note was then and there of the value of seventy-five dollars; that said two bank-bills and said promissory note were then and there of the aggregate value of ninety dollars, which said Perkins and Baum received and obtained of said Joseph Mink by means of the false representations and pretenses so made as aforesaid with intent unlawfully, feloniously and falsely to cheat

and defraud said Joseph Mink of his said two bank-bills, and of his said promissory note; whereas, in truth and in fact, said Perkins and Baum were not then and there State marshals, nor were either of them State marshals, or any other officers authorized to arrest and imprison said Joseph Mink, nor had they, said Perkins and Baum, a State warrant legally issued for the arrest of said Joseph Mink, on said alleged charge of forgery; nor were said Perkins and Baum authorized, neither had they the power, to legally compromise and settle said alleged forgery, or any other crime, for said money and note; neither had they the power to compromise any crime in the State; that said Perkins and Baum well knew, at the time they so made said representations and pretenses, that each and all of said representations and pretenses were false. So the grand jury aforesaid," etc.

The law is well settled, that in an indictment of this kind, the false pretenses by which a thing of value is obtained must, to be criminal, be such as would deceive a person of ordinary sense, prudence and caution and induce him to part with the thing obtained from him, and they must be made of some existing state of facts; if made of facts to occur in the future, which may never exist, they will not be sufficient, however false and criminal they may be. The difficulty lies in applying the law to the facts averred in the indictment before us.

The counsel for appellant have furnished us with an able and valuable brief, which has aided us much in our researches. The strongest case they have cited in favor of the appellant is *People v. Stetson*, 4 Barb. 151. In that case, the charge was that Stetson, with felonious intent to cheat and defraud one Royal Barlow, feloniously, unlawfully, knowingly and designedly, falsely pretended and represented to said Barlow that he, the defendant, was a constable, and had a warrant issued by Butler Bardwell, Esq., a justice of the peace of said county, against said Barlow, for a rape, and produced a forged and false instrument purporting to be such warrant; and represented and pretended to said Barlow that said pretended warrant had been issued by said Bardwell, and then and there proposed that said Barlow should pay him twenty-five dollars, and also offered to settle the same if Barlow would deliver him a certain silver watch, the property of said Barlow. That Barlow believing the said false pretenses and representations, and being deceived thereby, was induced by reason thereof to deliver and did

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deliver to said Stetson "one silver watch of the proper moneys, valuable things, goods and chattels, personal property and effects of the said Royal Barlow; which Stetson received and obtained by means of color of the pretenses and false tokens and representations aforesaid, and with intent, etc., to cheat and defraud the said Royal Barlow of the said watch." The above averments are then negatived in the indictment. This indictment was held insufficient on demurrer; but there seems to be an important difference between that case and the one before us. They are similar in the pretense of having the warrant, but in that case there was no threat to arrest Barlow if he did not deliver the watch, and no demand of the watch, to be protected from arrest; it was an offer to settle the same if Barlow would deliver the watch, without any pretense that he had any authority to settle it by receiving the goods, and it was upon this ground, as we understand the opinion of MAYNARD, P. T., that the indictment was held to be insufficient.

In the case before us, the pretense alleged is, that they had the warrant and the power to arrest Mink, but would not arrest him if he would comply with their terms as stated. The difference between an offer to settle the matter on certain terms, without saying any thing about an arrest, and a promise not to arrest if certain terms demanded were complied with, is important. The one is an offer, the other a demand; the one says nothing about an arrest, the other implies a threat that they would arrest unless the terms were complied with. If the pretense had been true, namely, that they were officers and had the warrant, they could have lawfully arrested him; add to this the pretense that if he did not comply with their demands they would arrest him, and we think they were calculated to deceive a person of ordinary sense, prudence and caution; and we think these averments contain the main substance of the indictment.

The promise made to Mink that they would "settle and compromise" the crime is unimportant; it not only referred to a future fact, but was a promise which Mink was bound to know they could not perform.

Upon a careful study of the arguments on behalf of the parties, and a full examination of the authorities, we have arrived at the conclusion that the indictment is sufficient, and therefore that the court did not err in overruling the motions to quash and in arrest of judgment. *People v. Haynes*, 11 Wend. 557; *People v. Haynes*,

14 Wend. 546; *People v. Williams*, 4 Hill, 9; *Smith v. People*, 47 N. Y. 303; *State v. Mills*, 17 Me. 211; *People v. Pray*, 1 Mich. N. P. 69; *In re Greenough*, 31 Vt. 279; *Cowen v. People*, 14 Ill. 348; *The State v. Magee*, 11 Ind. 154; *Maley v. State*, 31 id. 192; *Todd v. State*, id. 514; *Leobold v. State*, 33 id. 484; *Jones v. State*, 50 id. 473; *Keller v. State*, 51 id. 111; *Clifford v. State*, 56 id. 245; *State v. Timmons*, 58 id. 98; *Bonnell v. State*, 64 id. 498; 2 Bish. Cr. Law, §§ 433-443.

The judgment is affirmed, at the costs of the appellant.

NOTE BY THE REPORTER.—The decision in *People v. Stetson* is not quite accurately stated in the principal case. MAYNARD, P. J., in a brief opinion, put it on the grounds that the pretense was one which could not have deceived a person of ordinary prudence, and that there was no allegation of authority to compromise. He said nothing about the omission of any threat to arrest. But WELLES, J., who gave the principal opinion, put it on the ground first named, and also on the ground that the complainant was *particeps criminis*. He said: "In all the numerous reported cases under the English and American statutes to prevent the obtaining money, etc., by false tokens and pretenses, I have not found one which was held to be within the statute, in which the transaction on the part of the person injured would not have been lawful, provided the representations or pretenses were true, nor where such representations or tokens, if true, were not in violation of law. I cannot believe the statute was designed to protect any but innocent persons, not those who appear to have been in any degree *particeps criminis* with the defendant. To determine what attitude he occupies in that respect, it should be assumed that all the representations made to him, whether in words or tokens, were true, because it is an essential ingredient of the case that he believed them to be true; otherwise he could not claim that he was influenced by them. Looking at his conduct in that light and with that assumption, if i. parting with his money or his property, or yielding his signature, he was himself guilty of a crime, it cannot be that he is within the protection of the statute. Testing the case under consideration by these rules, it is impossible, in my opinion, to sustain the indictment. Barlow believed that the defendant was a constable and had a warrant against him for a rape. He is chargeable with knowledge that the law forbade any settlement or compromise of the matter, and that it would be a misdemeanor in the defendant to neglect to execute the process. In attempting to cheat the law he has himself been defrauded of his watch."

In *McCord v. People*, 46 N. Y. 470, there was no threat of arrest beyond the statement that the prisoner held a warrant of arrest, and the indictment did not allege any offer of compromise on the part of the prisoner nor any payment to stop the arrest on the part of the complainant. Still the indictment was held bad. The court said: "If the prosecutor parted with his property upon the representations set forth in the indictment it must have been for some unlawful purpose, a purpose not warranted by law. There was no legitimate purpose to be attained, by delivering the goods to the accused, upon the statements made and alleged as an inducement to the act. What action by the plaintiff in error was promised or expected in return for the property given, is not disclosed. But whatever it was, it was necessarily inconsistent with his duties as an officer, having a criminal warrant for the arrest of the prosecution, which was the character he assumed. The false representation of the accused was, that he was an officer and had a criminal warrant for the prosecutor. There was no pretense of any agency for, or connection with any person, or of any authority to do any act, save such as his duty as such pretended officer demanded. The prosecutor parted with his property as an inducement to a supposed officer, to violate the law and his duties; and if in attempting to do this he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offense. Neither the law nor public policy designs the protection of rogues in their dealings with each other; or to insure fair dealing and truthful-

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ness, as between each other, in their dishonest practices. The design of the law is to protect those who, for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not protect those who, for unworthy or illegal purposes part with their goods."

PERKINS, J., dissenting, said: "It would seem to be enough, so far as such a case is concerned, to observe that no such exception, as is here sought to be taken, is found in the statute against obtaining property by false pretenses; and in my judgment neither principle, authority nor public policy requires the courts to insert it. No offense would have been committed by the complainant in this case had the settlement been made as supposed. Hence, this does not conflict with *People v. Stetson*, 4 Barb. 151. There the settlement of a felony was substantially alleged, showing that the complainant was guilty of a misdemeanor thereby, and in parting with his property; and hence the indictment could not be sustained. That I believe is the only case that declares such doctrine. Many a weak and innocent man would have imitated the complainant in that case, rather than had a charge of such a character made against him before the public. In truth, the complainant in that case was guilty of no crime whatever in what he did, as the whole thing against him was a fiction. But the principle seems to be, to hold him guilty in order to shield the villain who put him in so terrible a dilemma.

But if an offense were committed by the party defrauded in advancing the money, or would have been, if the pretenses were true, how does that discharge the offense committed in obtaining it? How absolve the offender? This statute, it should be borne in mind, is not solely for the relief of the party defrauded. Its purpose is to punish a public offense, to punish and to prevent fraud, and to protect the weak and credulous. Where both parties to a civil suit are equally guilty of a felony, out of which the action arises, the law refuses its aid to either. It leaves them where it finds them. This rule has no application to criminal proceedings; the complainant is no party to that proceeding. The people are the party prosecuting, not the complainant. There is no ground for that rule in a criminal case, and there is no such rule. It would not seem to be an answer to say that there was another offender requiring punishment. In truth, there could be no other offender, upon the supposition that the pretenses were false, that there was no warrant and no right to arrest, no offense to settle, and none in fact settled, the whole thing being a sham."

"But," says Wharton (2 Crim. Law, §1180, note), "this is not the law where the prosecutor is simply the victim of ignorant terror, and endeavors under its influence to buy off a supposititious prosecution." Citing *Commonwealth v. Henry*, 22 Penn. St. 253; *Rex v. Asterley*, 7 C. & P. 191.

In *Commonwealth v. Henry*, where the question arose on a motion to quash, the indictment did not allege any representation of authority to settle nor any compromise of the alleged crime, but simply that the prisoner falsely pretended to have a warrant for the arrest of the complainant's daughter and threatened to arrest her, by means whereof he obtained money. This was held good. So here the question of *particeps criminis* did not directly arise, and it was discussed in the opinion.

Rex v. Asterley, was the case of an attorney, who got money from a woman who had been fined, on the false representation that he had got other like fines reduced, and could get hers reduced. No question of *particeps criminis* arose here.

In *Commonwealth v. Morrill*, 8 Cush. 571, it is however held that it is no defense to an indictment for obtaining goods under false pretenses, that the party defrauded made false representations to the defendant as to the goods so obtained. The court said: "If it should appear that Lynch had also violated the statute, that would not justify the defendants. If the other party has also subjected himself to a prosecution for a like offense, he also may be punished. This would be better than that both should escape punishment because each deserved it equally."

In speaking of the *Stetson* and *Morrill* cases, Bishop says (2 Crim. Law, § 469), "and this view," i. e., of the *Morrill* case, "accords with the general spirit of the criminal law, wherein the fault of one man is not received in excuse for that of another; while the New York doctrine would introduce a well-known principle of civil jurisprudence into a system of laws to which it is alien."

DENSMORE V. STATE.

(67 Ind. 306.)

Criminal law — reasonable doubt — “common sense.”

In a criminal case, it is error to charge that reasonable doubt of guilt means doubt suggested by or arising out of the proof made, and that in considering the evidence and arriving at a verdict, “what is called common sense is perhaps the juror’s best guide.”

CONVICTION of larceny. The opinion states the case.

W. C. Glasgow, for appellant.

T. W. Woollen, attorney-general, and *J. S. Drake*, prosecuting attorney, for the State.

WORDEN, J. The appellant was indicted, in the court below, for stealing a cow, and upon trial was convicted and sent to the penitentiary.

The court gave to the jury certain charges, to which the defendant excepted. Among them are the following :

“4th. The presumption of innocence continues until the proof of guilt is made clear and conclusive, leaving no other reasonable inference and excluding all reasonable doubt. A reasonable doubt is one suggested by, or arising out of, the proof made, and after a full and fair consideration of all the evidence, *pro* and *con*, remains in the mind, causing some degree of uncertainty as to the alleged guilt. If the evidence against the accused can be explained on any consistent and reasonable hypothesis, there must be an acquittal.

“It is not meant to be said, however, that the proof of guilt must be certain to a mathematical demonstration; it needs be only to a moral certainty, such as would warrant a prudent and cautious man in voluntary and unhesitating action, in a matter of the highest concern to himself.

“It is not a reasonable doubt, which may be raised by conjecturing something for which there is no foundation nor suggestion in the evidence adduced.”

The following is a part of the 8th charge :

“Gentlemen of the jury: Bearing in mind clearly all I have said to

you, as to how you are to consider the evidence, and arrive at your verdict, I may add, that what is commonly called common sense is, perhaps, the juror's best guide in these particulars."

The residue of the charge had reference to the statutory description of the crime charged and its punishment.

We think the court, in the fourth charge fell into an error in defining a reasonable doubt. It may be difficult to frame an exact definition of a reasonable doubt — such a one as will embrace all the elements that enter into such doubt and nothing more; such a one as will be neither too broad nor too narrow.

The court said :

"A reasonable doubt is one suggested by, or arising out of, the proof made, and after a full and fair consideration of all the evidence, *pro* and *con*, remains in the mind, causing some degree of uncertainty as to the alleged crime."

Is it true that a reasonable doubt must be one "suggested by, or arising out of, the proof made?" It seems to us, that this definition is much too narrow and limited. The words "suggested by, or arising out of, the proof made," imply that the doubt must be such a one as is created or produced by the proof made. That they were used to convey this idea is shown by the latter part of the charge, in which the court said:

"It is not a reasonable doubt, which may be raised by conjecturing something for which there is no foundation nor suggestion in the evidence adduced."

It is thus seen that according to the charge, it is the "proof made" or evidence "adduced" that is the foundation of a reasonable doubt. This excludes all reasonable doubts that may arise from the lack or want of evidence.

The state may make out a case, *prima facie*, beyond a reasonable doubt, but the defendant's evidence may be such as to raise a reasonable doubt of his guilt. The charge may have been drawn with a view to such case. But on the other hand, the lack of evidence on the part of the State may leave a reasonable doubt as to the defendant's guilt. And it is not the law, as we think, that a reasonable doubt may not be raised upon the conjecture of the defendant's innocence, though there is nothing in the "evidence adduced" that furnishes a foundation for or suggestion of the conjecture. The evidence adduced may have no tendency whatever to show the defendant's innocence, and yet it may utterly fail to establish his guilt.

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See, as to reasonable doubts, *Arnold v. State*, 23 Ind. 170; *Bradley v. State*, 31 id. 492; *Sullivan v. State*, 52 id. 309.

We are also of the opinion that the court erred in that part of the eighth charge above set out.

In that charge, the court, after reminding the jury of what he had said to them in respect to the manner in which they were to consider the evidence and arrive at their verdict, added, that "what is commonly called common sense is, perhaps, the juror's best guide in those particulars."

Now, while common sense is a very desirable and admirable quality in man, and exceedingly useful in all the practical affairs of life, including the duties of jurors, we do not see how it can be a better guide to them in the discharge of those duties than the rules of law. Indeed, the rules of law are generally the condensed common sense of ages. But the common sense of twelve jurors would not be likely to be all alike. What one might regard as the common-sense view of a question, another might think utterly destitute of common sense. If each juror were to act upon his common sense instead of the rules of law, there might be as many different pinions as there were jurors. With each juror acting upon his own common sense instead of the rules of law, we might expect a verdict in accordance with law "when everlasting fate shall yield to fickle chance and chaos judge the strife."

[Omitting a minor point.]

The judgment below is reversed, and the cause remanded for a new trial. The clerk will give the proper notice.

Judgment reversed.

SESSENGUT V. POSEY.

(67 Ind. 408.)

Negligence — contractor — ruinous building under repair.

The owner of a house which had been burned suffered the walls to stand in an unsafe and tottering condition for three weeks, meantime removing the rubbish. He then contracted for the rebuilding of the house. About seven or eight weeks after the fire, and while the premises were in the charge and possession of the contractor, one of the walls fell on the buildings of an adjoining owner. *Held*, that the owner of the ruinous premises was liable for the damage.*

*Compare *Mahoney v. Libbey* (123 Mass. 20), 28 Am. Rep. 6.

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ACTION of damages. The opinion states the case. The defendant had judgment below.

B. Hynes and A. Gilchrist, for appellant.

C. Denby, D. B. Kumler, J. S. Buchanan, H. C. Gooding and C. Buchanan, for appellee.

NIBLACK, J. This appeal is from a judgment rendered in an action in which John G. Sessengut was the plaintiff and Louisa J. E. Posey was the defendant.

The complaint was in a single paragraph, charging that on or about the 1st day of October, 1874, the defendant's building, consisting of brick walls, and situated in the city of Evansville, was burned, leaving the north wall in an unsafe, insecure and tottering condition, and liable to fall over at any time, and that said north wall was negligently permitted to remain in such condition until the 22d day of November, 1874, when it fell over on the plaintiff's adjoining building, doing great injury to the latter building, and to property contained within it.

The defendant answered:—

1st. In general denial;

2d. Setting up the prompt and careful making of a contract for the repair of the burned building;

3d. Averring that the wall complained of was blown down by a storm of great and unusual violence, without any fault of the defendant.

Demurrers were interposed, but overruled, to the second and third paragraphs of the answer.

Issue being joined, a jury trial resulted in a verdict and judgment for the defendant.

The plaintiff having since died, Elizabeth Sessengut, the administratrix of his estate, has appealed, and assigned error upon the overruling of the demurrer to the second paragraph of the answer, and upon the refusal of the court to grant a new trial, as prayed for by the plaintiff after the return of the verdict against him.

The second paragraph of the answer admitted that the defendant was the owner of a life estate in the building alleged to have been burned, and the burning of the building as charged in the complaint; also, that the north wall of her said building had fallen

upon and injured the plaintiff's building, but averred that said wall was left in a safe, strong and good condition, and was not injured by the fire, and that the defendant immediately employed one hundred skillful and competent men to remove the rubbish and to repair her building, who at once proceeded carefully and properly with their work.

Said paragraph further averred, "that she, the defendant," is not liable for "the said injuries, for the reason that immediately after the said fire occurred, and one month before the happening of the injuries described in the complaint, she made and entered into a written contract with one Ernest F. Meyer, who was then a competent and reliable builder and contractor, living in Evansville aforesaid, * * * by which contract the said Meyer agreed and stipulated to do all the work, and to furnish all the materials required for the execution of the work according to the drawings, and subject to the conditions set forth in certain specifications for the repair and rebuilding of said store, in consideration that the defendant would pay to him certain sums of money therein agreed on; that said specifications were prepared by a competent and reliable architect; and said contract, and said mode of repairing said building, was a prudent, proper and skillful contract and reasonable in its provisions; and said contract provided for doing said work in the only way it could be done without endangering human life; and immediately after the execution of said contract, the said Meyer took the sole and exclusive possession of said building, without any let, control or hindrance on her part, and commenced the execution and performance of said contract; and while said building was so in the sole and exclusive possession of said Meyer, and while he was executing said contract, the defendant then being at her home, in the State of Kentucky, and neither by herself nor any agent exercising any control or direction over the said work, the said wall fell and the said injuries happened. Wherefore she asks judgment for her costs."

Copies of the contract and specifications referred to were filed with this paragraph, but not constituting the foundation of the defense, they did not thereby become a part of the paragraph. *Wilkinson v. City of Peru*, 61 Ind. 1; *Parsons v. Milford*, 67 Ind. 489.

This court has recognized the rule, that one person is not liable for the acts or negligence of another, unless the relation of master

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and servant exists between them ; and where an injury is done by a party exercising an independent employment, the person employing him is not liable. See *Ryan v. Curran*, 64 Ind. 345; s. c., 31 Am. Rep. 123, and authorities there cited.

But in this case, the action was not for an injury inflicted by Meyer, the contractor, in the exercise of his independent employment, but for the alleged negligent omission and delay of the defendant in causing the proper repairs to be made to her building. Hence, we think, the facts set up as above, in the second paragraph of the answer, did not make a case falling within the rule recognized by this court.

As applicable to cases analogous to the one in hearing, Shearman & Redfield, in their work on Negligence, at section 15, lay down the rule as follows :

“ Since a liability cannot be delegated so as to compel a third person to seek redress for the principal’s negligence against an agent or other person, it follows that one who is bound to perform a duty cannot relieve himself from liability for its non-performance by any contract which he may make for its performance by another person. Therefore, the fact that he may have used the utmost care in selecting an agent to perform this duty, or that he has entered into a contract with any person by which the latter undertakes to perform the duty, is no excuse to the person upon whom the obligation originally rested, in case of failure of performance. His obligation is to do the thing, not merely to employ another to do it. Thus, a municipal corporation, bound to repair its streets, is not relieved from liability for non-repair by the fact that it has made a contract for such repairs with a responsible and competent person ; and a railroad company cannot defend itself against the claims of passengers for injuries by showing that it has employed the best servants that it could possibly obtain.”

The doctrine thus announced by Shearman & Redfield is well sustained by authority, and in its application to the case before us, constrains us to hold that the plaintiff’s demurrer ought to have been sustained to the second paragraph of the answer. Whart. on Neg., § 185; Shearm. & Redf. on Neg., § 502.

[Omitting a question of practice.]

The judgment is reversed, with costs, and the cause is remanded, for further proceedings not inconsistent with this opinion.

PARKE V. ROSER.

(67 Ind. 500.)

Negotiable instruments — raised check — certification.

B. presented a check to the bank on which it was drawn, after banking hours, and the cashier told him they would pay it during banking hours. Relying on this, B. advanced the amount to the payee and took the check. The bank paid the check the next day. Subsequently discovering that it had been fraudulently raised, the bank sued B. to recover the amount so paid. *Held*, that they were entitled to recover, although B. was ignorant of the forgery.*

ACTION to recover money paid by mistake. The opinion states the case. The defendants had judgment below.

W. Loudon, for appellants.

W. P. Edson, for appellees.

SCOTT, J. This action was brought to recover, as for money paid by mistake, the amount paid by plaintiffs to defendants, upon a check which had been altered and raised after issue.

Answer as follows :

“ For answer to this complaint, the defendants say, that on the 23d day of October, the day upon which the check was drawn, after the bank of plaintiffs had been closed for that day, said Bates requested them to cash the check, and thereupon they took the same to plaintiffs and exhibited it to them, and were informed by them that they would pay the same during banking hours, and relying upon this statement, they paid Bates eighty dollars, and Bates thereupon indorsed the check to them ; that at the time they took the assignment of the check from Bates, and at the time they received payment of the same from the bank, they had no suspicion that the check had been raised.”

There was a demurrer to this answer for the want of facts. The demurrer was overruled, and exception entered.

The plaintiffs filed a reply to the answer as follows :

Contra: Louisiana Nat. Bk. v. Citizens' Bk. of Louisiana (28 La. Ann. 189), 25 Am. Rep. 92. and note, 96.

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“That at the time they said they would pay the check, and at the time they did pay the same, they had no suspicion whatever that the check had been raised, but believed it had been originally drawn for eighty dollars.”

There was a demurrer to this reply, for want of sufficient facts. Demurrer sustained, and exceptions entered. A general denial to the answer was then filed. Trial, and finding for the defendants, and judgment on the finding.

The rulings upon the demurrers to the answer and reply are assigned for error, in this court.

Is the answer sufficient in law to bar the plaintiffs' recovery? As the question is one not settled by any decision of this court, we think it proper to go somewhat into detail.

Stripped of the verballity necessary in pleading, the following may be taken as the true state of the case :

Long drew his check for eight dollars, in favor of Bates or bearer on the plaintiffs, his bankers. Bates, or some other person, wrongfully altered the check to eighty dollars, took it to defendants, and desired them to cash it; the defendants took it to the plaintiffs; they said they would pay it during banking hours; defendants then took it back to Bates, paid him the money on it, and had him indorse the check to them. The next day, during banking hours, the defendants presented the check to the plaintiffs, and received thereon the full amount, the sum of eighty dollars. Both parties all this time believed the check to be genuine, and neither party had any suspicion that the check had been altered and raised.

Suppose Bates had presented the check himself, and got the money on it; no one would pretend for an instant that the plaintiffs could not recover from him. Suppose, when the defendants presented the check in the first instance, the plaintiffs, instead of saying they would pay it during banking hours, had actually paid the money to the defendants, as they might have done, as the check was payable to bearer; would any one suppose that the plaintiffs could not have recovered, when it was discovered that the check had been altered and raised? We think not. Suppose that Bates had presented the check to the plaintiffs, and had the same certified in the usual form, according to the custom of bankers, and the defendants had afterward cashed it; could they have compelled the plaintiffs to pay it? We think not. Suppose that

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when the defendants presented or exhibited the check to the plaintiffs, the plaintiffs had certified it in the usual form, instead of saying they would pay it during banking hours, and on this certification, the defendants had cashed it, and afterward presented it for payment, and the plaintiffs had refused to pay, for the reason that in the mean time they had discovered that the check had been altered and raised, and the defendants had brought suit on this altered, raised and forged check; could they have recovered? We think not; for the reason, that the certifying of a check is only an agreement that the signature of the drawer is genuine, and that he has the funds in the bank to meet it. *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; s. c., 17 Am. Rep. 305.

This being true, it follows, that if the plaintiffs had certified the check, and afterward paid it, before discovering it to be a raised and altered check, they could have recovered the money from the parties to whom it had been paid. *Security Bank of New York v. National Bank of the Republic*, 67 N. Y. 458; s. c., 23 Am. Rep. 129.

The next question is, can the oral promise of the drawee of a check be of more binding force than his written certification? In view of the principle involved, and the authorities, we think not. We can see no reason why the drawee of a check should be held to pay a forged check, where the forgery consists in altering the body of the check, upon an oral promise to pay during banking hours, when he could not be held liable upon his written certification of it. The demurrer should have been sustained to the answer.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the answer, and for further proceedings in accordance with this opinion.

OHIO AND MISSISSIPPI RAILWAY COMPANY v. SWARTHOUT.

(67 Ind. 567.)

Carrier — of passengers — ticket “good on passenger trains only.”

A railway ticket marked, “good on passenger trains only,” does not imply that all the passenger trains of the railroad company issuing it will stop at the station designated on it, nor impose on the company any obligation to stop there contrary to its rules.

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ACTION of damages. The opinion states the case. The plaintiff had judgment below.

C. A. Beecher, E. C. Devore, W. D. Ward and J. B. Rebuck, for appellant.

E. P. Ferris, G. Swarthout and W. W. Spencer, for appellee.

WORDEN, J. Action by the appellee against the appellant. Demurrer to the complaint for want of sufficient facts overruled, and exception. Final judgment for the plaintiff.

The complaint was as follows:

“ Aaron L. Swarthout, plaintiff, complains of the Ohio and Mississippi Railway Company, defendant, which is a corporation owning and operating a railway known as the Ohio and Mississippi Railway, and says that the defendant, before and at the time of committing the acts hereinafter mentioned, were and still are common carriers of passengers in cars run by defendant on their said railway, for that purpose, for certain reward, between the city of Cincinnati, Ohio, and St. Louis, Missouri, which said railway passes through the county of Jennings, State of Indiana. Plaintiff says he resides at Hardenburgh, a station for freight and passengers on said railway, in said county of Jennings, and that on the 8th or 9th day of March, 1875, he purchased of defendant, at said station of Hardenburgh, a first-class ticket (copy of the return part of the ticket is filed herewith, the other part was taken up by the defendant) of defendant's agent at said station of Hardenburgh, and paid said agent four dollars and eighty cents, defendant having tickets there to sell, which ticket so purchased entitled plaintiff to a passage in a first-class passenger car and no other, to the city of Cincinnati aforesaid, and return to said Hardenburgh station aforesaid, on defendant's said railway aforesaid. Plaintiff avers that on the 8th or 9th day of March, 1875, he got on board of a first-class passenger train, pursuant to the purchase of said ticket, and rode therein to the city of Cincinnati, State of Ohio, with and by no other permission than the ticket aforesaid, but that he returned from the city of Cincinnati, on said 9th day of March, 1875, on a first-class passenger train of defendant's, run on their said railway aforesaid, in charge of one Farmer, who was conductor and agent of defendant for conducting said train on which plaintiff was a

Ohio and Mississippi Railway Company v. Swarthout.

passenger, which said train runs from Cincinnati to St. Louis as aforesaid, and which train was at the time a night train.

“Plaintiff further avers that when said train approached the station of Hardenburgh on said railway aforesaid, said conductor neglected and refused to stop his said passenger train at said station, at Hardenburgh, the home of the plaintiff, and to let plaintiff get off of said passenger train, though requested and demanded so to do by plaintiff; and plaintiff further avers that one Woodward, who was superintendent at the time of said railway, and who had authority over said conductor and train, was on said train, and could have stopped said train at said Hardenburgh station, for the purpose of letting plaintiff get off of said train, who also, when applied to by plaintiff to stop said train, for the purpose of letting him get off, utterly and wholly refused so to do; and plaintiff further avers that in consequence of the wrongful acts and negligence of the defendant in not stopping said train aforesaid, and without fault or negligence of plaintiff, defendant took him past his house and station at Hardenburgh, at a late hour of the night, and thereby compelled him to stand the danger incident to night travel on said railway, to a station some eight miles beyond his house, thereby causing and compelling him to return on foot at a late hour of the night, to his damage.

“Plaintiff further avers that he was not at the time in very good health, and being kept up at night and broken of his rest in consequence of the action of defendant, he was greatly injured; and further, that he is engaged in the mercantile business, and, while absent as aforesaid, he left his son in charge of his business, who was afflicted with rheumatics, and that it was important for him to be at home as well for his own health as also to look after the health of his said son, and also to look after his business, by reason of all of which wrongs and gross and willful acts of defendant, plaintiff says he is damaged in the sum of twenty thousand dollars. Wherefore,” etc.

Exhibit.

“OHIO AND MISSISSIPPI RY.

“FIRST-CLASS TICKET.

“Cincinnati; return to Hardenburgh. Good on passenger trains only, within five days from date. March 9th, 1875.”

We do not perceive any substantial difference between this case

Husband v. Husband.

and that of *Ohio, etc., R. R. Co. v. Hatton*, 60 Ind. 12, in which the complaint was held insufficient.

Here, as in that case, it does not appear by the complaint, that the company undertook to carry the plaintiff upon any particular train, nor that the train by which he took return passage was one which, by the public running arrangements made by the company, stopped at Hardenburg. For aught that appears by the complaint, the train taken by the plaintiff on his return may have been one which did not, in accordance with the public running arrangements of the company, stop at the place mentioned.

The words in the ticket set out, "Good on passenger trains only," were intended, we suppose, to prevent any implication that the company was bound to carry the holder on freight, or any thing but passenger trains. They did not impose any obligation on the company to carry the holder on any passenger train that did not, in accordance with the public running arrangements of the company, stop at the place named, and to stop there, contrary to those arrangements, to discharge him.

The case above cited is decisive of the present, and we must hold the complaint insufficient.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance herewith

HUSBAND V. HUSBAND.

(67 Ind. 583.)

Marriage — divorce — liability of father for support of child awarded to mother.

Where a decree of divorce awards the custody of a minor child to the mother, the father is not further bound for the support and maintenance of the child.

ACTION to recover for support of an infant child. The opinion states the case. The defendant had judgment below.

M. W. Pearse, for appellant.

W. P. Edson, for appellee.

WORDEN, J. This was an action by the appellant, against the appellee, to recover an alleged indebtedness of two thousand dollars, "for the care, maintenance and support of one Adelia Husband, an infant daughter of the defendant, from the 5th day of March, 1863, to the 1st day of October, 1877, at the special instance and request of the defendant."

The defendant answered, that he was the father of the child mentioned, who was the issue of a marriage between himself and the plaintiff; that on the 4th day of the March term of the Court of Common Pleas of the county of Posey aforesaid, the plaintiff herein obtained in that court a decree of divorce against the defendant herein, and for the sum of fifteen hundred dollars as alimony, and for the custody of said child, and that during all the time for which the plaintiff sues for the support of said Adelia, the plaintiff, by the order of said court, as aforesaid, against the will and consent of the defendant, and not at his instance and request, assumed and took upon herself the care, custody and support of the said Adelia. Wherefore, etc.

The plaintiff demurred to this answer for want of sufficient facts, but the demurrer was overruled and exception taken. Thereupon, the plaintiff declining to reply, judgment was rendered for the defendant.

The question presented is, whether the court erred in holding the answer good. Does the law imply an obligation on the part of the father to pay his former wife for her support and maintenance of the minor child or children of the marriage, where she has obtained a divorce from him, and has, in the decree, been awarded the custody of such child or children?

This question must, we think, be answered in the negative. The right of the parent to the services of the child, and the obligation of maintenance devolving upon the parent, have been said to be reciprocal rights and obligations. See, as remotely bearing upon this point, the case of *Kerwin v. Wright*, 59 Ind. 369.

In 2 Bish. on Marr. and Div., § 557, it is said :

"The true legal principle applicable to cases of this kind seems to be, that the right to the services of the children and the obligation to maintain them go together; and if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation "

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There can be no doubt but that the awarding of the custody of the child to the plaintiff, in the decree of divorce, deprived the defendant of his right to her services. He could not command her services while the plaintiff was entitled to her custody. And if the principle above announced be correct, neither the former wife nor any one else could maintain an action against the father, for the support and maintenance of the child, while he was thus deprived of her custody and services, on any obligation arising out of duty.

But we desire to pass only upon the point involved in the case before us, and we express no opinion as to the right of a third person to maintain such action.

The statute in force at the time the divorce in question was granted provided that "The court in decreeing a divorce shall make provision for the guardianship, custody and support and education of the minor children of such marriage." 2 G. & H., p. 353, § 21. The same provision is contained in the present statute. 2 R. S. 1876, p. 331, § 21.

It seems to us to have been clearly intended that the rights of the parties in a proceeding for a divorce, as to the custody and support of the minor children of the marriage, should be settled and determined in that proceeding, and not be left open to further independent litigation.

It cannot be even plausibly contended that if the plaintiff had, in the divorce suit, been awarded a definite sum for the support of the child, she could afterward have maintained an independent action for more.*

But it was not necessarily obligatory upon the court to make any allowance to the plaintiff for the maintenance of the child, although her custody was awarded to the plaintiff. The matter rested in the discretion of the court granting the divorce, and was to be determined from the circumstances and the situation of the parties. *Conn v. Conn*, 57 Ind. 323.

The court may well have thought that the allowance to the plaintiff of the sum of fifteen hundred dollars, by way of alimony, rendered it unnecessary to make her a further allowance for the support of the child. But if no allowance had been made for alimony, the point here involved would have rested upon the same foundation.

*So held in *Burritt v. Burritt*, 29 Barb. 124.

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The action for divorce was one in which the plaintiff, if her case warranted it, might and should have obtained a provision for the support of the child; but having taken her decree for divorce, and the custody of the child without any provision for its support, she took upon herself the burden of its support without such provision, and cannot now maintain an action for such support. She is estopped by the record to claim now what she should have secured, if entitled to it, in the action for the divorce. If the court, in the action for divorce, erroneously refused to make her an allowance, to be paid by her husband, the father of the child, for its support and maintenance, she had her remedy.

We are of opinion that the answer was good, and the demurrer to it properly overruled.

The judgment below is affirmed, with costs.

EDGERTON V. STATE

(67 Ind. 588.)

Criminal law — feeding hogs on Sunday.

The question of desecration of Sunday by criminal labor is one of fact. It is not unlawful, in the fall, before corn is ripe, to haul corn to feed hogs in the field and to feed them there on Sunday, it being the ordinary practice of good husbandmen to gather the feed daily in the field.*

CONVICTION of Sunday desecration. The opinion states the facts.

J. H. Mellette and E. H. Bundy, for appellant.

T. W. Woollen, attorney-general, for the State.

BIDDLE, J. Prosecution against the appellant for desecrating the Sabbath, commenced before a justice of the peace. Conviction before the justice and appeal to the Circuit Court. Conviction and appeal to this court.

*The harvesting, on Sunday, of dead ripe wheat, which could not be sooner cut, and which might be spoiled by rain if left later, is not a desecration of Sunday. *Turner v. State*, 67 Ind. 585. See references, 26 Am. Rep. 84; *State v. Lorry*, 7 Bart. 195; a.c., 23 Am. Rep. 555, and note, 557.

Edgerton v. State.

Two questions are presented here :

1. Giving an alleged erroneous instruction to the jury by the court.

2. The insufficiency of the evidence to support the verdict.

The charge is that William Edgerton, on the 20th day of October, 1878, on the first day of the week, commonly called Sunday, was found unlawfully at common labor, to wit, gathering and hauling corn, said William being at the time over the age of fourteen years, said common labor not being then and there a work of charity or necessity, etc.

The court instructed the jury at the trial as follows:

“No. 2. If the defendant was engaged at common labor, as charged in the affidavit, on Sunday, but such labor was a work of necessity, you will acquit the defendant. If however the labor performed could reasonably have been performed on Saturday, and the defendant, by his neglect, created the necessity for the work on Sunday, then he would not be excused; for the law requires, that men should make all reasonable preparation for Sunday, so as to avoid the necessity of labor on that day. To create a legal necessity, the work must have been such as could not reasonably have been done on a previous week day, or be reasonably postponed until a future day. If it was not proper for the defendant to feed his hogs on Saturday enough to last them over Sunday, but he could on Saturday have gathered, and placed at a convenient point, enough corn for their wants on Sunday, and thereby materially lessened the labor to be performed on Sunday, it was his duty to do so; and if he neglected such needful preparation, and gathered and hauled the corn on Sunday, the work of gathering and hauling the corn on Sunday would not be a work of necessity, although feeding it to his hogs would be.”

We do not think this instruction is the true interpretation of the law. It directly states to the jury what labor would not be a work of necessity. This is a question of fact for the jury to decide, and not a question of law for the court to declare. Whether a work is a work of necessity or not must necessarily depend upon the facts in each case. Sometimes a similar state of facts would be a work of necessity, and sometimes not; the question therefore cannot be reduced to a proposition of law which is uniform, and applicable to all cases alike.

The principle was properly expressed by HOWE J., in the case of

Wilkinson v. State, 59 Ind. 416 ; s. c., 26 Am. Rep. 84, namely: "Labor performed on Sunday, which is necessary, under any particular state of circumstances, for the accomplishment of a lawful purpose, is not a violation of the Sunday law;" to which we may add in this case, that whenever labor is lawful and necessary to be done, then the usual and proper means by which it is done will also be necessary and lawful. It cannot be doubted, as matter of fact, that to feed hogs on Sunday is a lawful and necessary work; now, if according to the circumstances, the usual and proper means to feed them, according to the practice of good husbandry, was to gather the corn daily, and haul it to the pen and give it to the hogs, then gathering and hauling the corn and feeding the hogs on Sunday would not be unlawful; and whether such a method of feeding hogs on Sunday is a work of necessity or not must, in each case, be left to the jury to decide as a question of fact.

[Omitting a summary of the evidence.]

We cannot see any thing in this evidence out of the ordinary way in feeding hogs, in the fall of the year, before the corn is ripe enough to crib, as practiced generally in the State of Indiana, by good husbandmen. The work of feeding the hogs on Sunday being lawful and necessary, the manner of feeding them—taking into view the time of year, the condition of the corn, the place where the corn was, and where the hogs were—also became lawful and necessary; and the work thus being lawful and necessary, it was lawful and necessary to feed them on Sunday, in the same manner that would be usual and proper, according to the circumstances, to feed them on a week day.

The evidence is so clearly insufficient that we cannot approve the verdict.

A work of necessity, within the meaning of the statute, does not mean a physical or absolute necessity; but a moral fitness or propriety in the work done, under the circumstances of each particular case, may be deemed a work of necessity, within the meaning of the law. Nor need the necessity be dangerous to life, health or property, which is beyond human foresight or control. On the contrary, the necessity may grow out of, or be incident to, a particular trade or calling, and yet be a work of necessity within the meaning of the act. It is not the design of the law to impose onerous restrictions upon, or add burdens to, any lawful trade or business. It has been held that keeping up a blast furnace, run-

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ning a mill, manufacturing gas, supplying water by water-works, furnishing milk by dairymen, gathering and boiling sugar-water, making malt beer, taking watermelons to market, according to the circumstances of each case, are works of necessity within the meaning of the law; and we think that hauling the corn and feeding hogs on Sunday, under the circumstances of this case, fall within the same principle. See the case above cited; also *Morris v. State*, 31 Ind. 189, and the cases there cited, and *Crocket v. State*, 33 id. 416.

So strict a construction of the act as that held by the court below might authorize the arrest of superintendents, engineers, firemen, conductors and brakemen, while operating railroads, laborers in depots and stockyards, herdsmen and feeders of cattle, "engaged in their usual avocations" on Sunday, and thus embarrass, if not entirely stop, the great commercial interests and leading industries of the State, a result certainly not intended by the legislature that enacted the law.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings according to this opinion.

CASES
IN THE
SUPREME COURT
OF
IOWA.

LOWRY V. POLK COUNTY.

(51 Iowa, 50.)

Office and officer — county treasurer's liability for money lost by failure of depository.

A county treasurer is liable for the public money lost by the failure of a bank in which he deposited it, although the county provided no safe place for such deposit.*

ACTION to determine the liability of a county treasurer for moneys of the county deposited by him in a bank, and lost by the failure of such bank. The county provided no safe or vault for such deposits. The county had judgment below.

Barcroft, Given & Drabelle, for appellant.

W. E. Miller, for appellee.

SEEVERS, J. The official bond given by the plaintiff provides, among other things, that he "shall * * exercise all reasonable diligence and care in the preservation and lawful disposal of all money * * * appertaining to his office." This provision

*See *Cumberland v. Pennell* (69 Me. 357), 81 Am. Rep. 284.

Lowry v. Polk County.

was construed in *Ross v. Hatch*, 5 Iowa, 149, and it was there held, where money had been stolen from the county treasury without any want of reasonable care and diligence on the part of the treasurer, that he was not liable for the loss.

The case at bar is materially different from the one cited, in this: In that case the money was stolen from the "county treasury;" in this it was not in the treasury, but had been deposited, by the voluntary action of the plaintiff, with West & Sons, and thereby lost. It is true no suitable place had been provided by the county in which public money could be safely kept, but there is no provision of law imposing such duty on the defendant. This the plaintiff was bound to know when he entered upon the discharge of the duties of said office.

The action of the plaintiff in depositing the money received by him in banks was purely voluntary, because there is no evidence tending to show he ever requested the defendant to provide a suitable place in which it could be safely kept.

It is not deemed necessary to refer to the evidence as to the character and standing of West & Sons, or determine whether reasonable care was exercised by the plaintiff when the deposit was made with them.

It does not distinctly appear whether the money was deposited in the name of the plaintiff, or in his name as county treasurer. It was one or the other, and it is not regarded as material which. It was deposited, as deposits are usually made, from time to time, and checked out as the necessities of the treasury required. That such money became the property of West & Sons from the time it was deposited is believed to be, without doubt, true. *Marine Bank v. Fulton Bank*, 2 Wall. 252; *School District v. First National Bank*, 102 Mass. 174.

The relation of debtor and creditor, therefore, existed between plaintiff and West & Sons from the time the deposit was made.

County treasurers are prohibited by statute from "loaning out or in any manner using for private purposes State or county funds in their hands." Code, § 912.

The deposit in effect constituted a loan from the plaintiff to West & Sons, or a using of the money for private purposes, and was therefore an unlawful disposal of public money, and this constitutes a breach of the bond. Having failed to make a "lawful disposal" of the money the plaintiff is not excused from liability

 Charnock v. District Township of Colfax.

because of the failure of the bank in which it was unlawfully placed.

The claim made that the deposit was special is not well grounded. Such a deposit is one where, as we understand, the depositor receives back the identical money or thing deposited. In such case the right of property remains in the depositor.

The evidence does not warrant any such conclusion in this case.

Judgment affirmed.

 CHARNOCK V. DISTRICT TOWNSHIP OF COLFAX.

(50 Iowa, 70.)

Mechanics' lien — on public school-house.

A mechanics' lien will not attach to a public school-house.*

ACTION to enforce mechanics' lien against a public school-house. The defendant had judgment below.

Hemenway & Polk, for appellant.

J. Morris Rea and Boies & Couch, for appellee.

ROTHROCK, J. I. In *Loring v. Small*, 50 Iowa, 271, it was held that public bridges of a county cannot be made liable to a mechanics' lien under the statutes of this State. The ground of the opinion in that case is that the bridges are exempt from execution. For the same reason a mechanics' lien cannot be established against a school-house.

[Omitting a minor point.]

Judgment affirmed.

*To same effect *Loring v. Small* (50 Iowa, 271), 32 Am. Rep. 126. Contra, *McKnight v. Parish of Grant* (30 La. Ann. 861), 81 Am. Rep. 226.

Nugent v. Bates.

NUGENT V. BATES.

(51 Iowa, 77.)

Taxation — residence — change, when not presumed.

For purposes of taxation, a residence, once acquired, will not be presumed to be changed from the mere fact, that leaving his family, a man has gone elsewhere and entered into business.

PETITION for injunction to restrain collection of tax. The opinion shows the facts. The injunction below was dissolved.

O. C. G. Phillips and Williams & McMillen, for appellant.

C. C. McIntire and Lafferty & Johnson, for appellees.

SEEVERS, J. The appellees do not dispute the proposition that if the appellant was a resident of Chicago he was not taxable in this State. The plaintiff is married, and from 1871 resided with his family in the town of Osceola, in this State, until he claims to have moved to Chicago in September, 1875, which is not disputed. This latter date is stated in the petition to have been in 1874, but this must be a mistake, as the plaintiff in his affidavit states it was in 1875.

The family continued to reside at Osceola after September, 1875, there being no change in this respect except that the plaintiff was absent. He was in Osceola with his family at least once. This was in December, 1875, and how long he remained, or for what purpose he returned, does not appear.

Affidavits were filed by the plaintiff which, in terms, state that he was a resident of Chicago from September, 1875, until after January, 1876. Such affidavits are not entitled to consideration, because they state mere legal conclusions. The affidavits in effect merely state what, in their judgment, the law is.

The plaintiff states that he was a resident of Chicago at the time the assessment was made, and that he had been such since September, 1875, and further states: "I had at said time permanently located, as I supposed; had sold out my business in Clarke county, and was doing business in Chicago and no other place; at the time I was assessed had all my arrangements made to move my family to

Chicago, where I at that time was in business, and had purchased property, but owing to the failure of the bank at Osceola I was unable to carry out the plans. I had to let the trade go, as the bank was my security."

"The place where a married man's family resides is generally to be deemed his domicile. But the presumption from this circumstance may be controlled by other circumstance; for if it is a place of temporary establishment only for his family, or for transient objects, it will not be deemed his domicile." If his "family is fixed in one place, and he does business in another, the former is considered the place of his domicile." Story's Conflict of Laws, § 46.

When a residence is once acquired it is presumed to continue until there is satisfactory evidence of abandonment. *In Matter of Nichols*, 54 N. Y. 62. The only evidence of the abandonment of the residence which had been acquired in Osceola is that the plaintiff had gone to Chicago, purchased property, and gone into business with the intention of permanently locating there. But his family continued to reside in Osceola, as they had before the plaintiff went to Chicago. It is not claimed any preparations had been made for removal. To all appearances the family was permanently located in Osceola. We are of the opinion, under these circumstances, the plaintiff was a resident of Osceola, and rightly assessed and taxed there to the extent of the personal property owned by him. This view is sustained by *Bell v. Pierce*, 51 N. Y. 12; *Carroll v. Inhabitants of Freetown*, 9 Gray, 357; *Buckley v. Inhabitants of Williamstown*, 3 Gray, 463; *Otes v. City of Boston*, 12 Cush. 44.

[Omitting a minor suggestion.]

There is no reason for continuing the temporary injunction to the hearing. There is not the slightest evidence of fraud, and as to the question of residence we have only considered the undisputed facts and the showing made by the plaintiff.

Judgment affirmed.

Irons v. Kentner.

IRONS V. KENTNER.

(51 Iowa, 88.)

Bailment — or sale — storage of grain.

A. and B. delivered grain to defendant at his elevator, and received from him a memorandum that it was "bought, at owner's risk as to fire," but specifying no price. The grain was placed by itself in a separate bin. Subsequently the defendant made an offer for it which A. and B. refused. Still subsequently the elevator and grain were destroyed by fire without defendant's fault. It was the custom to receive grain in this manner and afterward buy or return it. *Held*, that defendant was not liable for the loss.

ACTION for value of wheat delivered to defendant.
Upon receiving said wheat the defendant delivered to Armstrong and plaintiff the following memorandum :

"TAMA CITY, August 24, 1872.

"Bought of T. K. Armstrong, for C. H. Kentner, to be delivered at his elevator, according to sample, wheat No. 3, at owner's risk as to fire."

The wheat was deposited in the elevator of the defendant, in a separate bin, and within one month thereafter the elevator with its contents was destroyed by fire, without fault of defendant. Afterward Armstrong assigned his interest in the memorandum to the plaintiff.

It was the well-known custom of all wheat merchants at that place, receiving wheat for parties in their respective elevators or warehouses, to mix all wheat of like grade in one common bin, to keep a sample of the same, and ship off the grain so left with them, and sell it; and when the parties who had left wheat with them wanted to sell, buy it, if they could, and if they did not, to return to said parties wheat of the same grade and quality as that they had left with them; and if the wheat should not be called for until it had been in their elevators more than one month, then such merchants were to charge one cent per bushel per month for the time said wheat should have been in said elevator.

There was judgment for plaintiff.

A. W. Guernsey and O. H. Mills, for appellant.

W. H. Stivers, for appellee.

ROTHROCK, J. The question we are required to determine is whether the transaction between the contesting parties constituted a sale of the wheat or a mere bailment. The evidence shows that the wheat in question was not deposited in a common bin with other wheat, but that it was placed in a separate bin, where it remained unmixed with other grain until it was destroyed by fire.

It further appears that no demand was made for the wheat by the plaintiff or Armstrong previous to the fire, but that the defendant, by his agent, offered the plaintiff ninety-five cents per bushel on the Saturday before the fire.

In *Johnston v. Browne*, 37 Iowa, 200, the ticket or memorandum given by Browne on receiving the grain in the elevator was in these words: "Bought of H. T. Pickett, for W. P. Browne, to be delivered at Browne's elevator, if all like sample _____ of wheat, at \$_____, in store, _____ buyer, _____ bushels _____ lbs."

It was shown in that case, by extrinsic evidence, that the understanding of the parties was that Browne, the proprietor of the elevator, was to ship and sell the grain on his own account, and when the depositor desired to sell Browne was to pay the highest price for the grain, or return a like quantity and quality.

That transaction was held to be a sale and not a mere storage or bailment of the grain.

In *Nelson v. Brown*, 44 Iowa, 455, the ticket or memorandum delivered to the depositor of the grain was in these words: "Received of C. C. Cowell, for Thompson, in store, for account and risk of C. C. Cowell, one hundred and eighty-three bushels No. 3 wheat. Loss by fire, heating and the elements at the owner's risk. Wheat of equal test and value, but not the identical wheat, may be returned."

It was held in that case that so long as the wheat remained in the elevator, though thrown in a common bin with wheat of like quality, the transaction was a mere bailment. It was there said: "But the warehouseman is not under obligation to retain the wheat of the depositor in his warehouse. He may, without breach of contract, and without being guilty of conversion, ship the wheat away on his own account. When he avails himself of this privilege the character of the transaction and the relation of the parties change."

Nye v. Iowa City Alcohol Works.

In the case at bar the ticket or memorandum expresses no completed contract upon its face. In this respect it is unlike the contract in *Marks v. Cass Co. Mill & Elevator Co.*, 43 Iowa, 146, where it was held the contract could not be explained by parol evidence because it was complete in its terms.

In this case no action can be maintained upon the instrument without the aid of extrinsic evidence. Parol evidence is necessary to fix the price agreed to be paid if it should be held to be a contract of sale, and whether a sale or mere bailment parol evidence is necessary to explain the figures indorsed on the instrument.

It was admitted the grain was delivered in pursuance of the alleged custom or usage, and it was shown that it was in the elevator in a separate bin when it was burned, and that the defendant offered to purchase it on the Saturday before the fire. These facts when taken in connection with the ticket, show clearly that the transaction was not a sale, but a bailment. It is true that the word "bought" in the ticket, unexplained, would import a sale, but when taken in connection with the expression "at owner's risk of fire," and in the light of the parol evidence, it clearly appears that a sale was not contemplated by the parties. "At owner's risk of fire" evidently means that so long as the wheat should remain in the elevator the plaintiff should bear that risk. If it was a sale it is not at all probable that any such words would have been used. In such case the warehouseman would have assumed the risk without any stipulation to that effect.

We think the case is clearly within the rule of *Nelson v. Brown*, *supra*, and that, as the identical wheat remained in the elevator and was consumed with it the defendant is not liable.

Judgment reversed.

NYE V. IOWA CITY ALCOHOL WORKS.

(51 Iowa, 129.)

Sale — warranty — vendee's knowledge of defect.

When one buys machinery, with a warranty, but receives and puts it in operation with knowledge that it is defective, he cannot recover damages for the breach during the time of such use.

Nye v. Iowa City Alcohol Works.

ACTION for services. Counter-claim for breach of warranty of a pump for the use of a distillery. The plaintiffs had judgment below.

Remley & Swisher, for appellants.

Cone & Holton, for appellees.

SEEVERS, J. There was evidence tending to show the distillery had been completed, with the exception of the well, and that plaintiffs were so informed at the time the contract of hiring was entered into. The evidence also tended to show that the plaintiffs warranted the pump to be new, in perfect order, and of sufficient capacity to discharge eight hundred gallons of water per minute, and that it was not new or in perfect order, and that its capacity did not exceed four hundred gallons per minute.

If the pump had been of the capacity it was warranted to be, the parties expected and the evidence tended to show, the well could have been completed in five days, but it in fact took eighteen days to do so, owing, as was claimed, to the defective pump.

The defendants claim that plaintiffs warranted that with the use of the pump the well could be completed in five days. But we fail to discover there was any evidence so tending. The contract was made in Chicago, and the well was situate in this State. The plaintiffs had no knowledge of the character of the ground or of the obstacles likely to be encountered, nor had they any right to say what force should be employed in digging. It is not reasonable, therefore, to infer that they obligated themselves to finish the well in any given time. Nothing short of positive evidence that they had so contracted would warrant the jury in so finding. So far from there being such we think they did nothing more than express their belief or opinion it could be accomplished in that time.

The defendants contracted to pay a certain sum per day for the use of the pump, and for the services of a man to operate it, and in addition thereto were to pay the freight to Iowa City and back to Chicago, and were to be responsible for all damages sustained to the pump. The uncontradicted evidence is that the pump was cracked during its transit from Chicago, whereby its capacity was greatly diminished, and defendants were so informed on its arrival, and before operations were commenced. The person sent from Chicago by the plaintiffs to operate the pump made efforts, or at

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least said he would do so, to repair the injury, so that the well could be finished. Otherwise than this the plaintiffs had no knowledge the pump had been injured.

No objections were made by the defendants to the course taken, but they acquiesced therein ; nor did they make any effort to procure another pump or protect themselves from injury. They had paid nothing on the contract at the time the injury to the pump was discovered.

The court instructed the jury that if they found for the defendants on the counter-claim the measure of the "recovery will be the difference in value to the defendants per day between what the pump would have been worth if it had been as represented or warranted, if you find there was a warranty, and what the pump was really worth per day in the condition in which it was ; but you will not allow defendants any sum for rental value of the alcohol works during the time they were using the pump."

The appellants insist this instruction is erroneous because they were not allowed to recover the rental value of the distillery. In this view we do not concur, because it was the duty of the defendants, in so far as they could, to have protected themselves from loss or damage. *Davis v. Fish*, 1 G. Greene, 406 ; *Malher v. Butler County*, 28 Iowa, 253. So far from making any efforts in this direction they, at the time the pump was placed in the well, had knowledge it was defective, and in all probability it would not discharge the water as fast as the plaintiffs had warranted it would. They had paid nothing on the contract and were not obliged to accept the pump. Besides this it was not injured through any fault of the plaintiffs, but while it was in transit, and for such injury the defendants under the contract were responsible.

These facts are exceptional. The cases are numerous where defects in machinery have been discovered after it has been in operation for a time. In such cases damages such as that claimed in this case may be recoverable. But our attention has not been called to any adjudicated case in which such damages have been allowed where the machinery was known to be defective before operations were commenced therewith, and on principle we think such damages cannot be recovered.

While it is true such damages as arise naturally from a breach of a contract, or such as may have been contemplated by the parties, are recoverable (*Mihills Mfg. Co. v. Day*, 50 Iowa, 250), yet we

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think such rule does not apply in the present case. It may be conceded that under the contract as originally made in Chicago, if there had been no change in the circumstances, and there had been a breach of the warranty, the rental value of the distillery would have constituted the measure of the defendants' damage; but under the circumstances, and the acts and conduct of the parties, we do not think either of them could have contemplated that the plaintiffs would be liable to such damages, if, owing to the injury to the pump, delay was caused.

The instruction was fully as favorable to the defendants as they were entitled to. From what has been said it will be readily seen there was no error prejudicial to the defendants in the fourth instruction, limiting the recovery of damages to five days. The instruction is based on the theory that plaintiffs warranted the well could be completed in that time. Whether the plaintiffs might not have justly complained that they were prejudiced by such instruction, is not before us.

Judgment affirmed.

NEILSON V. IOWA EASTERN RAILROAD CO.

(51 Iowa, 184.)

Mechanics' lien — writing not necessary — railroad rolling stock — materials not used.

A contract, to afford a foundation for a mechanics' lien, need not be in writing, the statute not requiring it.

A mechanics' lien does not attach to railroad rolling stock.

A mechanics' lien attaches for materials furnished according to contract, whether they are used or not.

ACTION to enforce a mechanics' lien. The opinion states the case. The plaintiff had judgment.

J. O. Crosby, W. B. Fairfield, L. O. Hatch, Thos. Updegraff, S. Murdock, W. E. & H. A. Odell and E. H. Williams, for appellant.

L. Bullis, for plaintiffs.

Stoneman & Chapin, for assignee.

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SEEVERS, J. I. It is insisted that the plaintiffs are not entitled to a lien because there was no express contract that the ties were to be used in the construction of the road. That is to say, there must not only be a contract, but it must specify, or rather contain a "covenant that said ties shall be used in the construction of the Iowa Eastern Railroad."

To entitle the plaintiffs to a lien the ties must have been furnished "under or by virtue of a contract with the owner or proprietor." Revision, § 1846. It is not required by the statute that the contract should be express or in writing. It may therefore be implied. That the general term contract includes written, oral, express and implied contracts is undoubtedly true. The conclusion is, therefore, irresistible that all these classes of contracts are within the statute.

In *Cotes v. Shorey*, 8 Iowa, 416, it is said: "This contract need not be in writing, nor need it be proved by direct and positive evidence." See, also, *Jones v. Swan*, 21 id. 181. The contract includes furnishing the materials and the use. The whole may be implied. It cannot be divided into parts, and one portion implied from the circumstances and acts of the parties and the other not. If a contract is express it is clearly not implied. It must be one or the other. It cannot, ordinarily at least, be both. If the rule insisted on by appellant should be adopted a mechanic could not have a lien based on an implied contract. To so construe the statute would amount to judicial legislation.

It is, however, said our statute and those of Ohio and New York are identical, and that a construction has been adopted in those States in accord with the views of counsel for the appellant. *Choteau v. Thompson*, 2 Ohio St. 114, and *Hatch v. Coleman*, 29 Barb. 201, are relied on. We have carefully read these cases, and in our opinion neither of them sustains the position of counsel. We cannot resist the conclusion that the former, as a whole, is in direct opposition to the claim made; and as to the latter it is sufficient to say if it were directly in point we should not be disposed to follow it. *Cotes v. Shorey*, before cited, and *Stockwell v. Carpenter*, 27 Iowa, 119, when carefully considered, will be found to sustain, in a degree at least, the views herein expressed.

[Minor points omitted.]

IV. The petition states that the plaintiffs, in May, 1872, made with the defendant a "contract to furnish to said defendant ties

to be used in the construction of a railroad on the land and right of way of the said defendant, to-wit: between the junction of the Iowa Eastern railroad and the Milwaukee & St. Paul railroad, in the township of Giard, in Clayton county, Iowa, at a place called Beulah, and a place near Elkader, in said county, to which said Iowa Eastern railroad is completed."

It is also averred a lien statement had been filed. It is evident if it was not essential to the establishment of the lien that such a statement should have been filed, the question of a variance between the one filed and the petition would be immaterial.

The petition, it will be observed, asks that the lien be established "on the land and right of way." It also asked its establishment on the rolling-stock. This was done. If the rolling-stock was appurtenant to and constituted a part of the real estate it was unnecessary to ask that the lien be established thereon.

We have then for determination the question, whether one who furnishes ties for the purpose of being used in the construction of a railroad can have a lien on the rolling-stock. If it is real estate, or constitutes a part of the "building, erection or improvement," he has such lien; otherwise not. The land, road-bed and right of way, and whatever is appurtenant thereto, are real estate, and constitute the "building, erection or improvement" contemplated by the statute.

Is the rolling-stock appurtenant thereto in such sense as to make it a part of the real estate? This question has been frequently mooted and largely discussed. It is said there is not an entire accord in the authorities in reference thereto. It was considered by this court in *City of Davenport v. M. & M. R. Co.*, 16 Iowa, 348, and *City of Dubuque v. I. C. R. Co.*, 39 id. 56. In the first case, LOWE, J., seems to have been of the opinion that rolling-stock was a part of the road. The other justices expressed no opinion on this point. In the last case BECK and DAY, JJ., expressed the opinion that the rolling-stock of such corporations was personal property. No opinion in relation thereto was expressed by the other justices, one of whom was on the bench when the first case was determined. The question is therefore an open one in this State.

The leading cases in which it is said it has been determined that rolling-stock is real estate, to which our attention has been called, are *Pennock v. Coe*, 23 How. 117; *Gee v. Tide Water Canal Co.*,

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24 id. 257; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Railroad Co. v. James*, 6 id. 750; *Scott v. C. & S. R. Co.*, 6 Bliss, 529; *Farmers' Loan and Trust Co. v. St. Jo. R.*, 3 Dill. 412; and *Pierce v. Emery*, 32 N. H. 485.

No such question was determined in the case last cited. The only matter decided was as to the validity and effect of a mortgage on after-acquired property. This is evident from the subsequent case of the *B. C. & M. R. v. Gilmore*, 37 N. H. 410, which is an authority in favor of the proposition that rolling-stock is personal property, and our attention has not been called to a single decision of a State court holding differently. We are not prepared to say, however, there are none.

It has been said: "Engines and cars are no more appendages of a railroad than are wagons and carriages of a highway. Both are equally essential to the enjoyment of the road; neither constitute a part of it." *State Treasurer v. Sommerville & Easton R.*, 28 N. J. L. 21. There is much force in the foregoing because the instances are not unfrequent where one corporation owns the road and franchise, and another the rolling stock.

In the late case of *Williamson v. New Jersey Southern R.*, 29 N. J. Eq. 311, a case we have not seen, the Court of Appeals of New Jersey is said, in an elaborate opinion, to have held that rolling stock was personal property and not real estate.

The cases above cited in the Federal courts, it is said, were distinguished, as we think they well might be, on the ground, if no other, that in some of them the only question involved was as to the power to execute, and the effect and validity of mortgages as to after-acquired property. In one, rolling stock had, by the statute of the State under the laws of which the corporation existed, been declared to be a fixture, and in another the property in controversy consisted of the houses, lots and locks of a canal company.

It has been determined in the following cases, in addition to those above cited, that rolling stock is personal property. *Randall v. Elwell*, 52 N. Y. 521; s. c., 11 Am. Rep. 747; *Hoyle v. Plattsburgh R. Co.*, 54 id. 314; s. c., 13 Am. Rep. 595; *Chicago & N. W. R. v. Borough of Fort Howard*, 21 Wis. 45; and *Coe v. Columbus R. Co.*, 10 Ohio St. 372.* In *Hoyle v. Plattsburgh R.*, it is said the "want of the element of localization in use is a controlling and conclusive reason why the character of realty should not be

*To same effect *Meyer v. Johnston*, 53 Ala. 237, 352.

given to rolling stock of a railroad," and in this thought it must, we think, be admitted there is much force. How can it be said that a car belonging to a railroad in this State, when being propelled through the State of New York at the rate of twenty miles an hour, is real property in this State? The proposition to us seems absurd. In *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57; s. c., 24 Am. Rep. 719, we approved of the criterion adopted in *Teaff v. Hewitt*, 1 Ohio St. 511, that in determining whether a given thing was real estate "the intention of the party making the annexation to make a permanent accession to the freehold" was a controlling consideration. Tested by this rule rolling stock cannot be regarded as real estate. The intention may be ascertained by the use, and common and universal custom and usage. It is well known that the cars of one road are in constant use on other roads. It was never intended otherwise. The demands of commerce and trade require it. It was never intended they should be annexed permanently to the freehold. It may be safely assumed that all mortgages executed on railroads specially mention rolling stock as being included. Why is this done if it was regarded as real estate, or as appurtenant thereto? Why the labored efforts of counsel, sustained by the elaborate opinions of the highest court in the country, demonstrating that mortgages executed by such corporations were liens on after-acquired rolling stock, if the same was appurtenant to the realty?

About an afterward erected station-house there never was any doubt, because it is permanently annexed to the real estate, such being the intention. Not so, however, as to rolling stock; hence the strain to prove it was covered by mortgages previously executed. For the reason above stated, and because the decided weight of authority, as we believe, is in favor of the rule, we hold that rolling stock is not real estate, and that the plaintiffs are not entitled to the lien thereon. In this respect the court below erred.

V. The ties were delivered at the place designated in the contract. A portion thereof were not used. More were contracted for than were required to construct that portion of the road which was built; the corporation being unable, for want of means, as we understand, to construct any more than it did at that time. For the ties not used it is insisted the plaintiffs are not entitled to a lien.

The argument amounts to this: If a person contracts and furnishes a million of bricks for the purpose of erecting a building,

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and the owner, for want of means to complete the whole, erects only a portion as originally intended, and uses only one-half of the bricks so furnished, the materialman can only have a lien for the bricks actually used. Such cannot be the law. There is such an element of injustice and wrong in the proposition that nothing short of a positive statute would justify its adoption. All the materialman has to do under the statute is to "furnish" the material for the designated use. This gives him a lien to the extent of the value of the materials furnished, if the building or any part of it is constructed.

It is immaterial whether the materials are used or not. If this be not so the owner might sell the material furnished, and with the money obtained therefor purchase other materials, erect the building therewith, and thus defeat the lien. Such a proposition cannot, we think, be maintained, and it was so held in *Esslinger v. Huebner*, 22 Wis. 602.

[Omitting minor points.]

Affirmed on rehearing.

Modified and affirmed.

KNOXVILLE NATIONAL BANK V. CLARKE.

(51 Iowa, 264.)

Negotiable instruments — alteration — negligence in leaving blank.

A negotiable note for ten dollars was executed with a blank preceding the amount. Afterward the words "one hundred and" were fraudulently inserted before the word "ten." There was nothing in the note to excite suspicion, and it was subsequently transferred to an innocent person. *Held*, that he could not recover. (*See note*, p. 137.)

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

Stone & Ayres, for appellant.

Anderson & Briggs, for appellee.

SEEVERS, J. — When the note was presented to the defendant and executed by him it contained blank spaces, and was as follows:

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“§ 10.

FRANKLYN, *March* 16, 1877.

“Six months after date I promise to pay to the order of C. H. Huff ——— ten dollars, at the ——— bank of ———. Value received, with interest at ten per cent per annum.

“JOHN CLARK.”

“———, witness.”

When the note was assigned to the plaintiff it was in all respects like the foregoing, except that “one hundred and” had been written before “ten,” and the figure 1 written after the dollar mark so that it appeared to be a note for one hundred and ten dollars. The words “Knoxville Nat.” had been written in the blank which preceded “bank,” and “Knoxville, Iowa,” in the blank following the word “of.” The bank had no knowledge of these alterations, and there was nothing on the face of the note tending to show them. It was assigned to the bank by a person purporting to be the payee thereof. About a year previous to this transaction the plaintiff had purchased negotiable paper of C. H. Huff, executed by the citizens of Marion county, which had been paid without question.

Before signing the note the defendant asked the persons to whom it was delivered why they did not fill up the blanks so as to make it payable at one of the Knoxville banks? The reply was they did not wish to do so because an agent of the payee would come around and collect the note when it became due. The sole question is whether, under the facts above stated, the plaintiff is entitled to recover.

There is a class of cases holding that the payee has authority to fill a blank in a promissory note left for the purpose of designating the place of payment (*Reddich v. Doll*, 54 N. Y. 234); and there is another class which holds, where a negotiable promissory note is intrusted to another for use, that there exists an implied authority to fill blanks therein.

In the note in the present case the blank for the amount was partly filled, and the serious question is whether the maker is responsible for an unauthorized alteration or addition thereto. As to this question there is a conflict in the authorities. The case of *Young v. Grote*, 4 Bing. 253, was decided in England in 1827. The facts were that the plaintiff signed some blank checks and left them with his wife, with directions to have the same filled up as his business might require during his absence. Mrs. Young delivered

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one of the checks to her husband's clerk and directed him to fill it up for fifty pounds and some shillings. This he did in her presence, and she desired him to get it cashed. Before doing so the clerk, without authority, altered the check by writing "three hundred and" before "fifty," so that the check, on its face, was for three hundred and fifty pounds and some shillings, and such amount was paid by the banker. The action was between him and Young, his customer. It was held the latter was liable for the amount so paid on the ground the plaintiff had been negligent in so drawing the check as to allow the alteration to be made without discovery. It is not too strong an expression to say that this decision has been doubted and shaken as an authority by more than one subsequent decision of the English courts. Especially is this so as to the ground upon which the ruling is based.

The most recent case to our knowledge is that of *Baxendale v. Bennett*, decided by the English Court of Appeal. It will be found in the *Albany Law Journal*, Vol. 19, p. 372. The facts were, the defendant, at the request of Holmes, accepted a draft as an accommodation bill at a time when a drawer's name was not signed thereto, and sent it to Holmes, who, however, returned it to the defendant. At this time it had no drawer's name thereto. The defendant put it in an unlocked desk in his chambers, from whence it was taken by some unknown person and came into the hands of the plaintiff as a *bona fide* holder for value. At this time the name of one Cartwright was signed to the draft as drawer.

The lower court found the bill had been stolen and was a forgery, but was of the opinion the defendant had by his negligence led to the bill being put into circulation, and as the plaintiff was an indorsee for value he was entitled to recover. But on appeal it was held otherwise, and that the negligence of the defendant would not justify a recovery. This case is in direct conflict with *Young v. Grote*, as to the question of negligence, and it was said the last-named case must be regarded as shaken as authority by what is said in *Bank of Ireland v. Evans Charity Trustees*, 5 H. of L. Cases, 389. The case of *Worrall v. Gheen*, 39 Penn. St. 388, is identical with the case at bar except as hereafter indicated. "The fraud was so well executed that the appearance of the note was not such as to excite the suspicions of a man in ordinary business. On inspection, a difference in the color of the ink with which the words '*one hundred and*' were written may be perceived." The italics are

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ours, and indicate the only distinction between the two cases. This, however, is a distinction without a difference, because the alteration was not such as to excite the suspicions of a man of ordinary business capacity: Such distinction is not alluded to by the court. *Young v. Grote*, however, is, and it is doubted.

The fact that there was a partly-filled blank in which the additional amount could be written was held to make no difference, and it was said: "This fact shows carelessness, but it was not the carelessness of the indorser, but the forgery of the maker, that was the proximate cause that misled the holder."

There is no material difference in the facts between the case just cited and *Garrard v. Haddam*, 67 Penn. St. 82; s. c., 5 Am. Rep. 412. In this case *Young v. Grote* is followed, and *Worrall v. Gheen* distinguished, because it was a case of "perceptible alteration;" and yet, as we have said, the ruling was not placed on the latter ground by the judges who at that time composed the court.

Zimmerman v. Rote, 75 Penn. St. 188, and *Brown v. Reed*, 79 id. 370; s. c., 21 Am. Rep. 75, are substantially alike. In one case the alteration consisted in cutting off a separate agreement, written on one end of the paper on which the note was written, and in the other the paper on which the maker supposed an agreement was written was so divided by cutting as to leave a negotiable promissory note. There was a recovery in both cases. They are not identical with the case at bar, and we are not prepared to say they may not be sustained upon some principle not applicable to it.

The facts in *Cornell v. Nebeker*, 58 Ind. 425, are like those in *Zimmerman v. Rote*, and the decision is based thereon. No independent reasons are given, except that "public policy demands such a line of judicial decision as will tend to give confidence" in negotiable paper "by securing the rights of the *bona fide* holder."

Harvey v. Smith, 55 Ill. 224, is based on *Young v. Grote*. *Leach v. Nichols*, id. 274, and *Subel v. Vaughan*, 79 id. 257, are not applicable. In *Yocum v. Smith*, 63 Ill. 321; s. c., 14 Am. Rep. 120, the plaintiff notified the defendant of the amount of the altered note when it became due. He made no objection thereto until a suit was threatened some time afterward. The case may possibly be supported on the ground of a ratification. It is true it is not so placed.

Neither the facts nor the point determined in *Capital Bank v.*

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Armstrong, 62 Mo. 59, and *Iron Mountain Bank v. Murdock*, id. 70, are such as to make them authorities in the case at bar.

In *Visher v. Webster*, 8 Cal. 109, the note when executed was complete in all respects except a blank for the rate of interest. This was afterward filled. All the court say is that "to fill a blank in a note is not an alteration."

In *Joseph v. National Bank*, 17 Kans. 256, the note when indorsed contained a blank for the amount. It was agreed this should be filled with four hundred dollars. Instead of this, eight hundred dollars was written therein. This was a mere excess of authority. We have alluded to the principal authorities cited by counsel for the appellee, except two or more decisions of this court which will be referred to hereafter.

On the other hand, *Wade v. Wittington*, 1 Allen, 561, and *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; s. c., 25 Am. Rep. 67, are on all fours with the case at bar, and it was there held the alteration rendered the notes void. The same ruling on the same state of facts was made in *Holmes v. Trumper*, 22 Mich. 427; s. c., 7 Am. Rep. 661. See, also, *Bradley v. Holmes*, 37 Mich. 1. In principle there is no distinction between the foregoing and *Bruce v. Westcott*, 3 Barb. 374.

It was held in *Woodworth v. Bank of America*, 19 Johns. 391, that the addition of words designating a place of payment discharged an indorser. We infer, however, the addition was written on the margin of the note and not in an unfilled or partly filled blank.

The same ruling was made in *Nazro v. Fuller*, 24 Wend. 374. In this case the additional words were written at the end of the note, as it was when executed. The distinction between this case and *Reddich v. Doll*, before cited, is caused by the character of the blank. In the latter case the word "at" immediately preceded the blank. The note in *McGarth v. Clark*, 56 N. Y. 34; s. c., 15 Am. Rep. 372, had a similar blank to that in *Reddich v. Doll*. Not only was a place of payment written therein, but the words "with interest" added thereto. It was held the addition of the last words rendered the note void. In *Goodman v. Eastman*, 4 N. H. 455, Eastman signed the note as surety for Harford, the amount of the note being twenty dollars. Before it was delivered to the payee Harford so altered it that it became a note for one hundred and twenty dollars. It was held Eastman was not liable. Here the payee was an innocent holder for value.

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In *Walterman v. Vose*, 43 Me. 504, the alteration was made by the maker with the knowledge of the indorsee before the transfer. The surety was discharged. The knowledge of the indorsee was not referred to in the opinion.

In *Steel v. Wood*, 6 Wall. 80, the note when executed contained "September" without more as its date. This was stricken out and "October 11th" inserted. The alteration was apparent on the face of the note. SWAYNE, J., states the point to be decided as follows: "The state of the case relieves us from the necessity of considering upon whom rested the burden of proof, the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month exonerates the maker, who has not assented to it." It was held there could not be a recovery on the note.

In *Angle v. N. W. M. Ins. Co.*, 92 U. S. 330, CLIFFORD, J., says "that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up," there exists an implied authority to fill the blanks, but that such authority "would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what was written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was delivered."

It is insisted by the appellee that this court, in *Trustees v. Hill*, 12 Iowa, 462; *McDonald v. Muscatine Nat. Bank*, 27 id. 319, and *Rainbolt v. Eddy*, 34 id. 440; s. c., 11 Am. Rep. 152, has determined the question under consideration in accord with the ruling below. In the first case authority was given to fill the blank left for the amount. A greater sum than had been agreed was inserted. This was a mere excess of authority. In the second case the court found the blank instrument had been delivered for some *purpose*, and that the filling the blank so as to make a promissory note was a gross fraud. The maker was held liable. The court, negatively at least, concluded a forgery had not been committed. The case, therefore, is not authority in the case at bar, as it is agreed on all hands the alteration in the present case was a forgery. In the last case "ten pr ct inst" was "written in a blank left in the note when executed." This case may possibly be supported on the ground that there existed an implied authority to fill

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the blank, or on the ground it is put in the opinion. It is there said: "Since the defendant, by executing a note and delivering it with a blank in it for the insertion of the interest, and thereby placing it in the power of the payee to do a wrong, as between him and the plaintiff, a *bona fide* purchaser for value, he ought to suffer the loss therefrom." This case cannot be regarded as authority in the case at bar, because in that case the blank was wholly unfilled.

The question under consideration must be regarded as an open one in this State. The authorities cited by the appellee, and the whole doctrine on that side, rest on *Young v. Grote*, as its foundation stone. Ever since that decision has been made there has been an apparent struggle to find some solid foundation upon which it could rest. In casting about for some principle on which it could be based several have, at various times, been suggested. They are—

1. That the plaintiff owed a duty to his banker, and their peculiar relations justified the court in sustaining the payment made by the banker.

2. The fact that the check was written by the plaintiff's clerk, and intrusted to him to draw the money, and by him the alteration was made, justified the decision.

We are not called upon to either affirm or deny the sufficiency of either of the foregoing reasons.

3. That the plaintiff was estopped from showing the truth. But this has been exploded in both England and this country. The plaintiff had not done or omitted to do any thing upon which an estoppel could be based, unless he owed a duty to his banker, and that is not applicable to the case at bar. Besides what has been said it may be remarked the decision was not placed on the ground that the plaintiff was estopped.

4. Negligence of the drawer of the check in leaving a blank partly filled. On this ground the court proceeded and the decision is based on the reasoning of the civil lawyers. But could it be anticipated that such negligence would cause another to commit a crime, and can it be said a person is negligent who does not anticipate and provide against the thousand ways through or by which crime is committed? Is it not requiring of the ordinary business man more diligence than can be maintained on principle, or is practicable, if he is required to protect and guard his business transactions, that he cannot be held liable for the criminal acts of

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another? If so, why should not the negligence of the owner of goods which are stolen excuse the *bona fide* purchaser?

Can it be fairly said that the negligence of the drawer of the check or maker of the note was the proximate cause of loss to the holder? It seems to us the proximate cause of the loss is the forgery, and this the maker had no reason to anticipate.

5. In some of the cases following *Young v. Grote*, the rule has been invoked, that when one of two innocent persons must suffer by the wrongful act of another, he must suffer who placed it in the power of such third person to do the wrong. It seems to us such rule can have no application to this class of cases. It has never, we think, been carried to the extent of making one person civilly liable for the crime of another, and on principle, we think it cannot be. As far as courts have gone in this direction is to make one person civilly liable for the fraudulent acts of another, whereby some third person has sustained a loss, the fraud being made possible by the acts and conduct or negligence of the person charged. *Douglass v. Matting*, 29 Iowa, 498, is of this character.

Lastly, it has been said the free interchange of negotiable paper requires the establishment of the rule adopted by the court below. At the present day negotiable paper is not ordinarily freely received from unknown persons. Forgeries, however, are not confined to such. But the necessities of trade and commerce do not require the law to be so construed as to compel a person to perform a contract he never made, and which it is proposed to fasten on him because some one has committed a forgery or other crime.

It should be borne in mind that much negotiable paper is executed by parties who have not in any just sense ordinary business capacity. Relying on this fact, advantages are taken which courts are asked to sustain because of the rules long established for the protection of good-faith holders of negotiable paper. We can but think courts have gone as far in this direction as can be safely done. We are not prepared to say any steps backward should be taken, but no such advance should be taken as to validate such paper as that in the case at bar. The interests of legitimate trade do not require that this should be done.

Believing the weight of modern authority is opposed to the rule adopted by the District Court, and that upon principle it cannot be sustained, the judgment must be

Reversed.

Knoxville National Bank v. Clarke.

NOTE BY THE REPORTER.— The following are the opinions in *Baxendale v. Bennett*, cited *supra*:

BRAMWELL, L. J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright, on and accepted by him. In very truth, he never accepted such a bill; and if he is to be liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name), without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance, across it. In this condition it, not being a bill, was stolen from him, filled up with a drawer's name and transferred to the plaintiff, a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief, with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed, and the drawer's name, *bona fide*, put by such person. I do not say such person could have recovered on the bill. I am of opinion he could not; but what I wish to point out is, that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque with no payee or date or amount, and it was stolen, would he be liable or accountable, not merely to his banker, the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted the cases of *Young v. Grote*, 4 Bing. 253, and *Ingham v. Pittman*, 7 C. B. (N. S.) 82; L. J. (C. P.) 294, go a long way to justify this judgment; but in all those cases and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument, it has not been got from him by the commission of a crime. This undoubtedly is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means or part of the means for committing a crime. But it is said that he had done so through negligence. I confess, I think he has been negligent, that is to say, I think if he had had this paper from a third person as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then *Bank of Ireland v. Evans' Trustees*, 5 H. of L. Cas 389, shows under such circumstances there is no estoppel. It is true that was not the case of the negotiable instrument, but those who complained of the negligence were the parties immediately affected by the forged instrument.

BRETT, L. J. In this case I agree with the conclusion at which my Brother BRAMWELL has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money, that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts LORRE, J., held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff. BRAMWELL, L. J., says that the defendant is not liable, because, if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never au-

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thorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party and he is liable. Sometimes it is said that the acceptor of such a bill is liable, because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance, intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person. In this case it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to the person, if he had filled it in to any amount that the stamp would cover, the defendant would be liable because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: The defendant accepts the bill and puts it into his drawer; it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he left it in his room for a moment, and a thief came in and stole it. He has never intended that the bill should be filled up by anybody, and no person was his agent to fill it up. Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by BLACKBURN, J., in *Swan v. North British Australasian Company*, 2 H. & C. 175; 32 L. J. 273, Ex., there must be the neglect of some duty owing to some person. Here how can the defendant be negligent who owes no duty to anybody? Against whom was the defendant negligent, and to whom did he owe a duty? He put a bill into a drawer in his own room, to say that was a want of due care is impossible. It was not negligence for two reasons, first, he did not owe any duty to any one; and secondly, he did not act otherwise than in a way which an ordinary careful man would act. As to the authorities that have been cited, in *Schultz v. Astley*, 4 Bing. N. C. 544, the blank acceptance had been filled up by a stranger, and a fraud had been committed; nevertheless the acceptor was held to be liable. There, however, the acceptance had been issued, and it was intended that it should be filled up by some one; but CAMPTON, J., in *Stressiger v. South Eastern Railway Company*, 3 E. & B. 556, said that case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham v. Primrose*, 7 C. B. (N. S.) 82; 28 L. J. 294 (C. P.), the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street. They were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable, because, said the court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing with it is to say we do not agree with it. In *Young v. Grote*, 4 Bing. 253, Young left a blank cheque with his wife, and in filling up the cheque for £50 the word "fifty" was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word "fifty" the words "three hundred and" were inserted. Notwithstanding the forgery, the court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his cheques on them with ordinary care; but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland v. Evans' Charity Trustees*, 5 H. of L. Cas. 389, PARKE, J., in delivering the opinion of the judges in the House of Lords, remarks, with reference to *Young v. Grote*, 4 Bing. 253: "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." He then gives instances in which a person

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would not be liable, and which govern the present case: "If a man should lose his cheque book, or neglect to lock his desk in which it is kept, a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged cheque would be enabled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?" Lord CRANWORTH, speaking of *Young v. Grote*, 4 Bing. 253, says that case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer, there must be something that amounts to an estoppel or ratification, "that the plaintiff was estopped from saying that he did not sign the cheque," and then he says that the doctrine of ratification is well illustrated in *Coles v. Bank of England*, 10 A. & E. 437. I think the observations made by the Lords in the case of *Bank of Ireland v. Evans' Charity Trustees*, 5 H. of L. Cas. 389, have shaken *Young v. Grote*, 4 Bing. 253, and *Coles v. Bank of England*, 10 A. & E. 437, as authorities. In the present case I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, J., concurred that the judgment ought to be entered for the defendant.

STATE V. LINDLEY.

(51 Iowa, 343.)

Criminal law — evidence — previous good character.

It is error to charge that previous good character is not a defense "as against facts positively or strongly proven and clearly indicating guilt."

CONVICTION of incest. The opinion states the case.

Bancroft, Given & Drabell and *M. H. Baugh*, for appellant.

J. F. McJunkin, attorney-general, for the State.

ROTHROCK, J. The defendant introduced a number of his neighbors as witnesses in his behalf, who testified that his general reputation was good, and that he was regarded in the community in which he lived as a man of proper behavior and conduct toward the opposite sex. No evidence was introduced by the State derogatory to the general character of the defendant. The court instructed the jury as follows upon this question:

"The previous good character of a defendant, when established, is a circumstance which should be taken into consideration, in connection with all the other facts and circumstances in the case, in determining as to his guilt or innocence. But such previous good character is not a defense and as against facts (if any) posi-

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tively or strongly proven, and clearly indicating the guilt of a defendant, it cannot avail as a ground of acquittal."

This instruction is not in accord with the rule adopted by this court in *State v. Horning*, 49 Iowa, 158, and in *State v. Northrup*, 48 id. 583; s. c., 30 Am. Rep. 408. The rule of those cases is that previous good character is admissible as a fact in all criminal cases, that it is to be given such weight as it is fairly entitled to in determining the question of guilt or innocence. There may be cases where a state of facts may be said to be strongly proven, and yet a jury may be justified, in the light of an unblemished character, in finding a verdict of not guilty. If however the rule were different, a careful examination of the record in this case satisfies us that the evidence was not of such weight and conclusiveness as to warrant the court in instructing the jury that evidence of good character should not prevail against facts strongly proven.

There are other alleged errors in the record. Upon one of them this court is not in entire accord. As the case must be reversed for the error above pointed out, we have not thought it necessary to determine the other questions presented in argument. If they should be again presented it will be upon additional argument, and we may then be able to determine them in a more satisfactory manner.

Judgment reversed.

BRIGHAM V. MYERS.

(51 Iowa, 397.)

Usury — by agent — husband and wife.

Where a husband, as agent for loaning his wife's money, takes a commission for himself beyond the rate of legal interest, without his wife's knowledge or consent, the loan is not vitiated for usury.*

ACTION on a promissory note, for \$1,000, and for foreclosure of a collateral mortgage. As part of the same transaction, the defendant had executed to the plaintiff additional interest notes, in such an amount as would make the rate of interest for the loan

*See *Ballinger v. Bourland* (57 Ill. 518), 29 Am. Rep. 60, and note, 70.

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equal to twenty per cent per annum. The defendants interposed the defense of usury. Other facts appear in the opinion. The defendant had judgment below.

Dyer & Fitchpatrick, for appellant.

J. L. Dana, for appellee.

ROTHROCK, J. The trial was had upon written evidence, in pursuance of the proper motion and order, and the parties are entitled to a trial anew in this court. The plaintiff is a married woman. That she was the owner of the one thousand dollars loaned is not put in issue by the pleadings. The money had been loaned to J. C. Mitchell upon a mortgage. Mitchell did not pay his loan directly to plaintiff. The loan to defendant was effected by Mitchell taking up his note and mortgage and paying to defendant the one thousand dollars for which the defendant executed the note and mortgage in suit. Mitchell drew the mortgage and notes from the defendant to the plaintiff in the plaintiff's dwelling-house, in presence of plaintiff's husband, who was attending to the business for the plaintiff. Plaintiff was not present when the business was transacted, but was in another room in the same house. It is claimed by the defendants that the evidence establishes the defense of usury because the husband was acting as agent of the plaintiff in making the loan, and taking the notes for the interest in excess of the ten per cent provided for in the note for the principal; and that the husband afterward collected the usurious interest notes and applied them in part, at least, to the support of the plaintiff. On the other hand, it is claimed by the plaintiff that she did not know that her money was loaned to defendant at any rate of interest greater than ten per cent per annum; that she did not authorize her husband nor any other person to make the loan at more than ten per cent interest; that she received only the note for the principal sum and ten per cent interest, and did not know that her husband had taken the interest notes in excess of the ten per cent per annum until after the commencement of this suit.

The law is well-settled that where an agent for loaning money takes a bonus or commission to himself beyond the legal rate of interest, without the knowledge, authority or consent of his principal, it does not affect with usury the loan of the principal. *Gokeg*

v. *Knapp*, 44 Iowa, 32; *Wyllis v. Ault*, 46 id. 46; Story on Agency, § 170; Tyler on Usury, § 156; *Condit v. Baldwin*, 21 N. Y. 219; *Rogers v. Buckingham*, 33 Conn. 81.

The appellant filed an abstract and the appellee filed an additional abstract. The correctness of one statement of the additional abstract is disputed by the appellant, and we have thus been led to an examination of the transcript. The plaintiff testifies in positive terms that her husband made the loan to Myers for her, and gave her the note for one thousand dollars; that she never knew that he received interest besides the interest on the note for one thousand dollars; that she never heard of any thing over ten per cent, and never saw the interest notes for the interest in excess of ten per cent until they were produced on the trial, and that she thought she was getting ten per cent interest and no more, and that she never authorized her husband to take more than ten per cent. The husband of the plaintiff testifies to about the same state of facts, with equal positiveness. Now, if the plaintiff had loaned her money by an agent other than her husband, we apprehend that under the above rule of law there would be no question that the plaintiff ought not to be affected by the unauthorized act of her agent. It would be a most unreasonable and unjust rule to presume that a principal authorized his agent to violate the law, and make usurious contracts, in the absence of evidence showing such authority. But it is insisted that the plaintiff and her agent are husband and wife; that the evidence shows that the husband managed the plaintiff's business, and collected the lawful as well as the usurious interest, and applied the same in payment, in part, at least, of the wife's support. This may all be conceded, and yet, as the wife did not know that any usurious interest was collected nor contracted for, nor applied to her support, she ought not to be held to her husband's illegal act. Under the statutes of this State the wife is clothed with the same property rights and charged with the same civil liabilities as her husband. "She can control her own property, vindicate her individual rights, and bind herself by contract as fully as her husband." *Spafford v. Warren*, 47 Iowa, 47.

The plaintiff, then, in contemplation of law, is not to be affected by presumptions against her rights because the agent who made this loan and contracted for and took usury was her husband. It is true the near relationship of the parties, principal and agent,

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might authorize a finding that the unlawful act was authorized by the principal upon slighter evidence than if they were strangers, but we would not be justified in allowing such considerations to outweigh the positive testimony of witnesses who are in no way impeached.

We think that it is not unjust to the defendant in this case to hold that if he contemplated taking advantage of this contract as usurious he should have seen to it that he made his usurious contract with the principal, or with an agent authorized to make such contract.

[A minor point omitted.]

The decree of the Circuit Court is reversed, and the cause is remanded for a judgment and decree of foreclosure for the amount due on the note for one thousand dollars, as appears on page 8 of appellant's abstract, including one hundred and two dollars and fifty cents attorney's fee, and the costs of the action; or if the appellant so elect, such decree will be entered in this court.

Judgment reversed.

SHEPARD V. WHETSTONE.

(51 Iowa, 457.)

Negotiable instrument — alteration — restoration.

A note was executed specifying no rate of interest. Afterward, without the maker's knowledge, the words "ten per cent interest from date" were inserted, by the payer's consent, immediately after the word "at," in a blank left for the insertion of the place of payment. Subsequently the added words were erased, and the erasure was visible. *Held*, that an innocent purchaser for value could recover on the note.

ACTION on a promissory note payable to the order of Ward, and by him indorsed to the plaintiff for value before maturity. After the execution of the note, it was materially altered by Ward's consent, and afterward and before the transfer to plaintiffs the alteration was erased and the note was restored to its original form. The plaintiff had judgment below.

C. H. & W. S. Wynn, for appellant.

Stow & Hammond, for appellee.

ADAMS, J. The note was executed by the use of a printed form, which form was in these words:

“_____after date I promise to pay to the order of _____ dollars, at _____; value received.”

After the word “at” was a blank left, evidently, for the insertion of the name of the place where the note should be made payable. The alteration consisted in filling this blank with the words “ten per cent interest from date,” no rate having been specified at the time of its execution. This alteration, if it had been allowed to remain, was certainly sufficient to invalidate the note in the hands of the payee. The question presented is whether the fact that the words constituting the alteration were erased, and the note transferred to the plaintiff is sufficient to enable him to recover notwithstanding the alteration. Where the note is restored, as in this case, to its original form, it expresses the precise contract which the parties entered into, and the objection, if any, to enforcing such contract must rest upon grounds of public policy, and not upon the necessity of protecting the maker in the individual case. That there is upon grounds of public policy a valid objection to enforcing, under some circumstances, a contract which has been altered, notwithstanding its restoration, seems to be well settled. This is so where the alteration was made with intent to defraud, and the instrument remains in the hands of the person making the alteration. Perhaps, indeed, it should be so held in the absence of any intent to defraud. *Hall's Adm'x v. McHenry*, 19 Iowa, 523. See, however, 2 Pars. on Notes and Bills, 270. But conceding that the importance of discouraging the alteration of instruments is such that a court is justified in declaring invalid an instrument which has been altered, and which remains in the hands of the person who made the alteration, notwithstanding the restoration of the instrument, it is evident that it should not be held invalid in the hands of an innocent purchaser for value. The punishment of an innocent person for an act done by another has no tendency to subserve the public interest or promote the public security.

That the plaintiff is a purchaser for value is not denied. Whether he purchased with notice that the instrument had been altered admits of some question. He had notice, of course, of what appears upon the face of the instrument, and it is insisted by the defendant that the instrument reveals an erasure, in proof of which the instrument itself has been submitted to our inspection. An

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erasure does manifestly appear. But an erasure is not necessarily an alteration. It is so only when made subsequent to delivery. Now, while the erasure was in fact made subsequent to delivery, we see nothing upon the face of it to indicate that it was not made before. This, to be sure, is denied by the defendant. He insists that the words erased appear to have been written with different ink from that used in the other written parts of the instrument. A very close inspection would possibly reveal that they were; but even if so, we think the fact such that it would ordinarily have escaped the observation of the most prudent person. All that can be said, then, is that certain words appear to have been erased. Whether it should have been inferred that the words were erased subsequent to delivery would depend much upon what would be the reasonable inference as to what the words were. The blank was left for the name of the place at which the note should be made payable. This blank was filled with certain words which were afterward erased. This was all that the plaintiff could see. The reasonable inference was that the note, as first drawn, was made payable at a particular place, and afterward by erasure was made payable generally. We see nothing in this to indicate that the erasure was not made before delivery. But the defendant insists, that conceding that such was the reasonable inference, there was enough in the mere fact of erasure to put the plaintiff upon inquiry. But this doctrine, in our opinion, has no application. A person is put upon inquiry only when he has reason to apprehend that the claim which he is about to acquire will conflict with another person's substantial rights. But the instrument in this case cannot, as we have seen, be declared invalid upon the ground that the defendant's just protection requires it, the contract expressed by it being precisely the contract which he entered into. In our opinion the plaintiff may be regarded as purchasing without notice of the alteration, and we see nothing in the demands of public policy which would require that a loss should be imposed upon him, and the defendant be allowed to escape a just liability.

Affirmed.

LONGUEVILLE V. WESTERN ASSURANCE CO.

(51 Iowa, 552.)

Insurance — wearing apparel in dwelling — destruction outside.

A policy insured "household furniture, useful and ornamental, including sewing machine, provisions and family wearing apparel, all contained in" a certain dwelling-house. The insured sustained damage to his personal apparel, part of the insured, while wearing it away from the insured premises. *Held*, that the policy covered the loss. (*See note, p. 147.*)

ACTION on a policy of fire insurance. The opinion states the case. The plaintiff had judgment below.

Shiras, Van Duzee & Henderson, for appellant.

J. C. Longueville, in person.

BECK, C. J. The policy sued upon insures plaintiff against loss "on his household furniture, useful and ornamental, including sewing machine, provisions and family wearing apparel, all contained in two-story frame dwelling on lot 6, Newbury's subdivision Dubuque, Iowa." The petition alleges damage by fire to one overcoat, one dresscoat, one vest and one shirt, being of the family wearing apparel insured, and avers that "said fire occurred without any fault or negligence, and without any connivance or collusion on the part of plaintiff, but was purely accidental, while he was riding in a sleigh on South Dodge street, in the city of Dubuque, and not being on the premises described in the policy, and while he was wearing said clothes on his person in the usual and ordinary way." A demurrer to the petition, on the ground that the policy covered the property mentioned only while it was upon the premises described, was overruled. The only question presented in the case involves the correctness of the court's ruling upon the demurrer.

The case, we think, comes within the rule of *McCluer v. Girard Fire & Marine Insurance Company*, 43 Iowa, 349, s. c., 22 Am. Rep. 249. The words "contained in the two-story frame dwelling," etc., are words of description of the property insured, indicating the place of deposit when not in ordinary use. The character of the property insured must be considered in determining the true con-

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struction of the policy. The household furniture is used only in the dwelling. It is proper to infer that the parties to the contract intended the risk should attach to it only when in the building specified. But wearing apparel, when used, must of necessity be worn sometimes away from the dwelling. We must infer that the parties to the contract intended the apparel to be used, and hence intended it to be used sometimes away from the dwelling. Of course the use of the apparel away from the dwelling must be of an ordinary use, and the dwelling must be the place of deposit for the apparel when not in use. The policy, therefore, does not contemplate that the insured may take a journey or sleep away from his dwelling; thus, when the apparel is not worn, keeping it in a place of deposit other than his own dwelling.

It will be observed that the language of the policy does not convey the idea that the apparel is to be kept in the dwelling. There can be no inference of a prohibition of ordinary use elsewhere.

Counsel for defendant advance the thought that the words "household furniture," used in the policy, are intended to cover the other articles of property, family wearing apparel and provisions; that is, family wearing apparel is included in the general term, "household furniture." They argue, that as the household furniture was covered by the policy only while in the dwelling, its component, wearing apparel, is subject to the same rule. The fault with the argument is that it does violence to the language and structure of the contract. Wearing apparel cannot be considered as a part of the household furniture; the words are never so understood. The language of the policy is of common use, and must be understood in its common acceptation.

In our opinion the court below correctly overruled the demurrer.

Affirmed.

NOTE BY THE REPORTER. See note, 22 Am. Rep. 253. In *Harris v. Royal Canadian Ins. Co.*, Iowa Supreme Court, April 6, 1880, the policy covered tools, pumps, etc., describing them as being "in the one-story frame building situated on the north side of the public square, and west of Fourth street, Port Dodge, Iowa." Held, a warranty that they would remain in the one-story building in which they were at that time situated, and their removal to another one-story building, similarly situated and some thirty feet distant, was a breach thereof.

In *Holbrook v. St. Paul F. & M. Ins. Co.*, 24 Minn. 229, the insurance was on mules, "all contained" in a certain barn. The court said:

"The claim that the policy covered the mules only while in the barn — that is, that the words in the policy, 'all contained in the two-story frame barn (30x100 ft.), situate (detached) in section 19, town 140, range 43, in Becker county, Minnesota,' limited the risk to the property while actually in the barn, or were a warranty that it should remain in

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the barn,— is determined by the decision in *Everett v. Continental Ins. Co.*, 81 Minn. 76, in which it was held that a clause with respect to the property insured (a threshing machine), 'stored in a barn on section 86, town 23, range 28, owned and insured by L. L. Chaffin,' was mere matter of description, operating to identify the property, and not a promissory stipulation on the part of the insured, nor a condition of insurance on the part of the insurer, that the location mentioned must remain unchanged, or, if changed, that while changed the insurance should cease or be suspended. Here the description is in some respects more full than in that case, but it is still within the principle acted on in that case, only matter of description or identification. Policies of insurance, unless the language excludes the presumption, must be presumed to be made with reference to the character of the property insured, and to the owner's use of it in the ordinary manner, and for the purposes for which such property is ordinarily held and used. Where the language is not too explicit to admit of it, the policy so far as regards the question whether it covers the property when removed from the place where it is described as being at the date of the policy, is to be interpreted upon this presumption. So, language which, occurring in a policy upon property from its character and in its ordinary use kept permanently and continuously in one place — as a stock of merchandise, or machinery in a building, or household furniture, or things stored — might, perhaps, be held to limit the risk to the property while in the place contained as described by the policy, could not, without defeating the manifest intention of the parties, receive the same interpretation when occurring in a policy upon entirely different property, the real and beneficial enjoyment of which forbids its being kept at all times in one place, such as horses, carriages, farming machinery, etc.

"The presumption we have referred to bears not only on the clause describing the location of the property, but also the condition in reference to an increase of risk. The condition in this policy seems more applicable to insurance on buildings than movable property. The blank used was evidently such as the company usually employed in insuring buildings rather than movable property. But although apparently more applicable to a building than to this kind of property, it must be given effect, if possible, in this policy. As the insurer insures the property while used by the owner in the ordinary way, and for the ordinary purposes for which the property is kept, he assumes all the risk from fire incident to such use and not merely that incident to the property during a part of the time, or while it may be kept in a particular place. In this case, the mules were used in cultivating a particular farm. The policy covered them while so used, and if the risk might be at times greater in such use than while they might be stabled in the barn, that greater risk is assumed by the company. The condition against increase of risk refers to an increase beyond that which the company assumes — to wit, that ordinarily incident to the use of the mules in the cultivation of the farm. Whether the risk was increased beyond that is not stated by the court below in its findings."

STATE V. KAUFMAN.

(51 Iowa, 578.)

Criminal law — consent to less than twelve jurors.

On an indictment for forgery, the prisoner is bound by his consent to be tried by less than twelve jurors.*

ON the trial, one of the jurors "being ill, with the consent of the defendant said juror was discharged, and with the consent of the defendant the trial, before eleven jurors, was resumed and concluded by the order of the court."

* See *State v. Worden*, ante, p. 27.

State v. Kaufman.

Hedges & Alverson and J. W. Slater, for appellant.

J. F. McJunkin, attorney-general, for the State.

SEEVERS, J. I. It is provided by statute that "the jury consists of twelve men, accepted and sworn to try the issue. All qualified electors of the State * * are competent jurors in their respective counties." Code, §§ 227, 4397. Both these statutory provisions have equal force. If one can be waived, so may the other. It was said in *State v. Groome*, 10 Iowa, 308: "If the defendant knew, at the time the jury was sworn, that any of them were not qualified to act as jurors, he would have waived his right to object thereafter." This decision was made under the Code of 1851, but sections 1630 and 2971 thereof are precisely the same as sections 227 and 4397 of the Code. That a defendant in a criminal action, by silence, may waive the benefit of a statutory provision was clearly recognized.

There are several other decisions which recognize the same principle. *Hughes v. State*, 4 Iowa, 554; *State v. Ostrander*, 18 id. 435; *State v. Reid*, 20 id. 413, and *State v. Felter*, 25 id. 67. It must therefore be regarded as the settled doctrine in this State that a defendant in a criminal action, with the consent of the State and court, may waive a statute enacted for his benefit.

II. The Constitution provides that "the right of trial by jury shall remain inviolate, * * * but no person shall be deprived of life, liberty or property without due process of law." Article 1, § 9, Code, 770. That the jury contemplated by the foregoing provision should consist of twelve competent persons will be conceded. The question for determination is whether a defendant in a criminal action, with the consent of the State and court, can waive the foregoing constitutional provision and is bound thereby. The first impression would be, we think, that a constitutional provision could be waived as well as a statute. Both, in this respect, have equal force, and were enacted for the benefit and protection of persons charged with crime. If one can be waived, why not the other? A conviction can only be legally obtained in a criminal action upon competent evidence; yet if the defendant fails at the proper time to object to such as is incompetent, he cannot afterward do so. He has a constitutional right to a speedy trial, and yet he may waive this provision by obtaining a continuance. A plea of guilty ordinarily dispenses with a jury trial, and it is thereby

waived. This, it seems to us, effectually destroys the force of the thought that "the State, the public, have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law." The same thought is otherwise expressed by Blackstone, vol. 4, p. 189, that "the king has an interest in the preservation of all his subjects."

It matters not whether the defendant is, in fact, guilty ; the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the State may be deprived of the services of the citizen, and yet the State never actually interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect. So in the case at bar. The defendant may have consented to be tried by eleven jurors, because his witnesses were then present, and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed to be for his interest? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they may desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule. It may be said that if one juror may be dispensed with, so may all but one, or that such trial may be waived altogether, and the trial had to the court. This does not necessarily follow. It will be time enough to determine such questions when they arise. Certain it is that the right to dispense with one or more jurors cannot be exercised without the consent of the court and State, and it may safely, we think, be left to them as to when or to what extent it may be exercised. We however may remark without committing ourselves thereto, that it is difficult to see why a defendant may not, with the consent of the court and State, elect to be tried by the court. Should such become the established rule, many changes of venue, based on the prejudice of the inhabitants of the county against the defendant, might be obviated.

The authorities are not in accord on the question under discussion. The foregoing views are sustained by *Commonwealth v. Dailey*, 2 Cush. 80 ; *Murphy v. Commonwealth*, 1 Metc. (Ky.) 365 ;

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Tyra v. Same, 2 id. 1. The crime charged in these cases was a misdemeanor, but in the first case this fact possessed no significance. The ruling is based on principle applicable to all criminal actions. We are unable to see how it is possible to draw a distinction in this respect between misdemeanors and felonies, because the Constitution does not recognize any such distinction.

The contrary conclusion was reached in *Cancemi v. People*, 18 N. Y. 128; *Allen v. State*, 54 Ind. 461; and *Bell v. State*, 44 Ala. 393; s. c., 17 Am. Rep. 40. In neither of these cases was the question largely considered. Substantially, they all seem based on the thought that "it would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the Constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and, we think, ought not to be tolerated." *Cancemi v. People*, before cited. This would have been much more convincing and satisfactory if we had been informed why it would be "highly dangerous," and should "not be tolerated," or at least, something which had a tendency in that direction. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used.

In *Bullard v. State*, 38 Tex. 504; s. c., 19 Am. Rep. 30, 247, the verdict was rendered by thirteen jurors. It was set aside. But it does not appear whether or not the defendant had any knowledge until after the verdict there was that number of jurors.

In *Williams v. State*, 12 Ohio St. 622, a jury trial was waived, and the defendants were found guilty by the court. On appeal the attorney-general submitted to a reversal on the ground that a jury trial could not be waived. The case was disposed of by the court in a single line, by saying such was the opinion of the court. It is evident the case was not very elaborately considered.

The following cases hold that a trial by jury cannot be waived and the same take place before the court. *Bond v. State*, 17 Ark. 290; *People v. Smith*, 3 Mich. 193; *League v. State*, 36 Md. 269.

The Constitution of this State provides that "in all criminal prosecutions * * * the accused shall have the right * * * to be confronted with the witnesses against him." Article 1, § 10, Code, 770. In *State v. Polson*, 29 Iowa, 133, "it was agreed in open court between the district attorney and counsel

of defendant, in the presence of the defendant and of the jury, that in order to save time and facilitate the trial of the cause the testimony taken upon the former trial should be read to the jury as a substitute for the oral testimony of the witnesses in court." A conviction followed, which was held to be right, and that the constitutional provision was a personal right and in no manner affected the jurisdiction of the court, and that it might be waived.

This decision in principle is identical with the case at bar. If one constitutional provision may be waived, why not another? The one is no more binding and obligatory than the other. Both are equally important.

III. No exceptions were taken to the instructions, but in the motion for a new trial it was objected that the verdict was not supported by the evidence. If the jury believed the witness Collins, and they must have done so, the conviction was undoubtedly right. Both the District Court and jury have passed on the sufficiency of the evidence, and the story told by Collins is not so improbable as to justify us in disbelieving him.

Certain objections were made on the trial to the admission of evidence. These are not pressed in argument of counsel. But as is our duty, we have examined them, and fail to find they, or any of them, are well taken.

Affirmed.

ANGELL V. JOHNSON.

(51 Iowa, 625.)

Exemption — waiver — estoppel.

One who sees his exempt property levied on and makes no objection, but being advised of his right, permits it to be taken, waives his right and is estopped from asserting it afterward.*

ACTION to recover an organ levied on by defendant, a constable. The opinion states the facts. The plaintiff had judgment below.

M. P. Hathaway, for appellant.

Brown & Wellington, for appellee.

*To same effect, *Brown v. Lettich* (60 Ala. 813), 31 Am. Rep. 42, and note, 44; but contra, *Vanderhorst v. Bacon* (38 Mich. 609), 31 Am. Rep. 328.

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SEEVERS, J. There was evidence tending to show that the plaintiff, although present, and fully advised in the premises, at the time the levy was made, did not claim the organ to be exempt from the levy. The constable testified that he made the levy because no claim of exemption was made. The defendants asked the court to instruct the jury, that "to entitle the judgment debtor to insist that property shall not be taken under execution, because the law exempts it, he must claim the exemption at the time of the levy. If he acquiesces, makes no claim, though present, neglects to assert his rights then, and voluntarily surrenders the property, he will be estopped from afterward asserting the exemption." This instruction was refused.

In *State ex rel. Haven v. Melogue*, 9 Ind. 196, it is said, "the exemption is a personal right which the debtor may waive or claim at his election."

The finding of the referee in *Richards v. Haines*, 30 Iowa, 574, was that "the property seized was delivered to the sheriff by Haines without making any claim that it was exempt from execution," and it was held that Haines could not afterward insist on such right. The language of the statute is that the debtor "may hold exempt from execution" certain specified property. Code, § 3072.

We are of the opinion the debtor cannot stand by, see and know the levy is about to be made, and afterward claim the exemption. He must at the time, in some manner, indicate to the officer his purpose to claim the property as exempt. That the exemption is personal there can be no doubt. That it may be waived is equally clear. By making the levy the officer incurs responsibility, and expenses are incurred. This can be avoided if the claim is made before the levy.

The instruction should have been given. It is not insisted by counsel for the appellee that the instruction should have been in any respect qualified, or that it is not applicable, but that it is not the law. It being insisted that there is a difference between voluntary surrender of the property and an acquiescence in the levy and taking possession by the officer, the only distinction is that the one is active and the other passive. The same results, however, follow both and they are equally within the law of estoppel.

Reversed.

CALWELL V. CITY OF BOONE.

.(51 Iowa, 687.)

Municipal corporation — liability for wrongful act of police.

A city is not liable for the wrongful act of its police in the enforcement of police regulations, and cannot become liable by ratification.*

ACTION for assault and battery, etc. The petition alleged that Butcher was the deputy marshal of the defendant city, and as such discharged a revolver at him, struck him with a policeman's billy, and arrested and handcuffed him, under pretense of enforcing an ordinance of the city, providing for the punishment of persons being drunk upon the streets of the city to the annoyance of the citizens; that the plaintiff was not drunk, as the defendant well knew; that nevertheless the defendant ratified the acts of the deputy marshal and caused the plaintiff to be imprisoned, and maliciously and without probable cause prosecuted him for the alleged offense, of which offense he was finally acquitted.

The defendant demurred. The court sustained the demurrer.

Holmes & Reynolds and *C. C. Cole*, for appellant.

Henderson & Hall and *I. N. Kidder*, for appellee.

ADAMS, J. The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city is not liable, therefore, for the acts of its officers in attempting to enforce such regulations. The question involved in this case arose in *Buttrick v. City of Lowell*, 1 Allen, 172. BIGELOW, C. J., said: "Police officers can in no sense be regarded as the agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature, as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts;" following *Hafford v. City of New Bedford*, 16 Gray, 297. The same doctrine was held in *Town of Odell v. Schroeder*, 58 Ill. 353. See, also, as tending to support it, *Ogg v. City of Lansing*, 35 Iowa, 495; s. c., 14 Am.

*To same effect, *Burch v. Hardwick* (30 Gratt. 24), 32 Am. Rep.

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Rep. 499; *Partheo v. City of Lexington*, 13 B. Monr. 559; *Elliott v. City of Philadelphia*, 75 Penn. St. 347.

It is contended, however, that if a city is not liable in the first instance for the illegal acts of its officers in enforcing a police regulation, it may become liable by ratification. But a city has no power to authorize a police officer to commit an unlawful act, and what it cannot do directly it cannot do indirectly by ratification. The same consideration disposes of the allegation that the deputy marshal was an unfit person for the office, as the city knew. His illegal acts could not become the acts of the city. .

We think that the demurrer was properly sustained.

Affirmed.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

THOMAS v. WOODMAN.

(28 Kans. 217.)

Injunction — acquiescence — estoppel.

An injunction against the diversion and damming of water will not be granted where the complainant has delayed proceeding for two years after acquiring knowledge of the injury, and the dam meanwhile has been twice rebuilt, and the injunction would work great damage to the defendant.

SUIT to remove and enjoin the rebuilding of a dam. The findings of fact were as follows.

1. The plaintiff owns a small body of land, upon which he has placed valuable improvements, and which he occupies as a home for himself and family. He purchased the place in the year 1873, and has ever since that time continued to reside upon it, and has been at considerable pains and expense to make it a desirable home. It consists of several acres of valuable land, upon the east bank of the Little Arkansas river, about one mile from its confluence with the Arkansas river, and is within the city limits of the city of Wichita, a city of the second class, containing a population of several thousand persons.

2. In the spring of 1874, Wheeler & Shutz commenced the erection of a flouring mill on Chisholm creek, a small stream about one-

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half mile east of Wichita. Chisholm creek empties into the Arkansas river several miles below the mouth of the Little Arkansas. Wheeler & Shutz laid the foundation of the mill and dug a trench from the Little Arkansas to Chisholm creek, in the spring and summer of 1874, and also commenced the erection of a dam across the Little Arkansas at and below the point where the trench touched the east bank of the Little Arkansas, the purpose of which dam and trench was to divert the water of the Little Arkansas river into Chisholm creek, to be used for a water-power with which to run the mill. The dam was located several miles (about five) above the plaintiff's premises.

3. In the mean time, Wheeler & Shutz commenced proceedings under the mill-dam act, to obtain the right to erect said dam, and to divert the water of the Little Arkansas into Chisholm creek.

4. The petition for the appointment of the commissioners was presented to the judge of the 13th judicial district of the State of Kansas, and of the District Court of the county in which the dam and mill were located, on the 23d day of May, 1874.

5. The petition set forth, that Wheeler & Shutz were the owners of the land upon which the proposed mill was to be erected; that the proposed dam across the Little Arkansas river would not exceed two feet in height. The petition also gave the names of the persons owning land to be affected by the erection of the dam, including the name of the plaintiff, and also designated the point at which the dam would be built and that the purpose was to divert a portion of the waters of the Little Arkansas. On the day the petition was presented, commissioners were appointed by said judge, in accordance with chapter 66 of the General Statutes of the State of Kansas. The commissioners qualified and proceeded to discharge their duties, and the plaintiff was duly notified of the time and place of their meeting to assess damages in the premises, and on the 4th of September following, the commissioners completed their report, and on the 9th of the same month their report was duly filed with the district clerk of the proper county.

6. No appeal was taken from the assessment of damages in their proceedings. The dam was erected and trench dug, and the erection of the mill building commenced, before the filing of said report.

7. The diagram hereto attached shows the location of the dam and trench, and mill and Woodman's premises, the Little Arkan-

sas and Big Arkansas and Chisholm creek, and the city of Wichita.

8. On June 13, 1875, Wheeler & Shutz sold a one-third interest in the mill property to Philip Sipe. On February 10, 1876, Wheeler, Shutz & Sipe sold the mill property to the defendant W. A. Thomas, and on the same day Thomas sold a one-third interest to J. C. Fraker, and a like interest to E. L. Wheeler. The consideration of the sale to Thomas was the sum of \$22,000. After Thomas, Wheeler & Fraker became the owners of the property, they expended \$7,000 in improvements upon it, and operated the mill until the 18th day of September, 1876, when Fraker sold to J. R. Mead, in trust for the creditors of the First National Bank of Wichita, and Mead conveyed to H. B. Cullum, receiver of the bank, and Cullum to the defendant Ellis. The interests of Thomas and Wheeler were sold under judicial sale, and Ellis purchased and now owns two-thirds of the property, and Lewis purchased the other third. The building of the mill and appurtenances cost about \$30,000.

9. Wheeler & Shutz erected a dam across the Little Arkansas river to the height of five and one-half feet, and it has been kept and maintained to that height since it was first erected.

10. It has been washed out three times, and again built, and is now to the height of four and one-sixth feet.

13. The dam, as constructed and maintained, diverts at least half of the water of the Little Arkansas river from the natural channel into Chisholm creek.

14. The effect of this diversion upon the stream below the dam is to cause the accumulation of sand bars at the mouth of the river, by which the water becomes sluggish. Without the dam there is at all times a current of clear, pure water. The current being impeded, as above described, caused a kind of grass to grow from the bottom to the top of the stream, which, at times, becomes very thick and rank, and as it decays, becomes offensive to the smell, and makes the water nasty and unfit to bathe in. Adjoining and near the premises of the plaintiff, the Little Arkansas river, in its natural state, is wide and deep, making a large body of water, which is particularly subject to the accumulation and growth of this grass, but when the waters up the river are allowed to run in their natural channel the grass does not grow in this pool, and it was never known to grow there before the erection of the dam.

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The odor arising from the grass at times becomes exceedingly offensive to the plaintiff and his family, and to any one passing near the bank of the river.

15. The building of this dam was a matter of general notoriety among the people of the city of Wichita and vicinity, and the defendant knew, from general rumor, that it was to be built, and the purposes for which it would be used ; but did not know, and had no reason to believe, that it would cause the grass to grow, and make the water and the atmosphere offensive, as it has.

16. Before Thomas purchased, he had a casual conversation with the plaintiff, in which he told the plaintiff that he intended to purchase the mill property, and put it in good running order. The plaintiff made no special objection at the time or afterward. At this time Woodman knew the height of the dam, and its effect upon the stream.

17. Woodman never gave any express consent to the erection of the dam, nor to the purchase by Thomas.

18. It was a matter of general notoriety that Woodman objected to the diversion of the water of the Little Arkansas river into Chisholm creek above his premises, he having written articles and had them published in the city papers, setting forth his objections. The articles were written after the purchase by Thomas.

19. Thomas swears that when he told Woodman that he intended to purchase the mill property, he also said that he intended to spend several thousand dollars in the improvement of the same, and that Woodman expressed his satisfaction thereat, and said that he was glad that some one with the requisite capital was going to take hold of the property and make it a paying investment. Woodman swears that he has no recollection of the conversation, and denies expressly that he expressed himself as pleased. On the other hand, he swears that he always objected to the use of the water-power, and whenever he said any thing about the subject he always urged that some one with the requisite capital take hold of the property and run it by steam power. From this testimony, in the light of the other testimony in the case, the court cannot find that Woodman gave any express consent to Thomas to use the water-power in running the mill, and the court cannot find that the conversation was of such a character as to leave Thomas to believe that Woodman had no objections to the diversion of the waters of the Little Arkansas river, for the purpose of a water-power.

21. The Little Arkansas river runs through lands which are underlined with a mixture of sand and gravel, through which the water percolates, by which the channel below the dam is fed ; and hence there is at an ordinary stage of water a current in the river below the dam, but the current is very much impeded and more or less sluggish, and especially so where the river passes through and by the premises of the plaintiff ; and it is by reason of this that the channel becomes clogged with sand bars, especially at the mouth of the river, and more especially when the Big Arkansas river rises without a corresponding rise in the little river.

22. The plaintiff in the fall of 1876 visited the dam when it was five feet high, and walked across the same. The dam was afterward washed out and rebuilt twice to the same height.

23. If the owners of the mill are compelled to abandon the dam on the Little Arkansas, the waters of Chisholm creek will be valueless as a water-power.

24. The mill machinery is so constructed that it may be operated by steam power, in which case the owners would be subjected to a considerable loss and expense.

25. The plaintiff never commenced any action to restrain the building or maintaining of said dam and the diversion of the water from the Little Arkansas, until he commenced this action.

26. Before Thomas purchased the property, he took legal advice as to the validity of the proceeding to obtain the right to divert the water from the Little Arkansas river, and was advised that the proceedings were valid. He believed this advice was correct, and gave him the right to divert the water.

27. The plaintiff discovered that the dam caused the water to stagnate and the grass or moss to grow, as above stated, in the summer of 1876.

28. When the river is swollen by heavy rains, no inconvenience results to the plaintiff, and if any grass has grown in the water it is washed out by high water, and the channel remains pure and abundant until the water subsides to an ordinary stage, and sufficient time elapses with low water to enable the grass to grow again.

29. In the trench or race-way there is a water gate which, when open, lets the water through Chisholm creek and to the mill, but when closed shuts off the water from Chisholm creek, and at the time the channel of the river is *fuller* and the current stronger than when the water gate is open. This has the effect to impede the

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growth of the grass, and as there will naturally be frequent occasion to shut down the water gate, and as there are frequent freshets which swell the river, the water of the river below the dam will generally be pure and sufficiently abundant to prevent any inconvenience to the plaintiff, but there is a probability at any time of a recurrence of the conditions which will cause an inconvenience and loss of comfort to the plaintiff and a depreciation of the value of his property, by reason of its proximity to the river bank, all this resulting from the stagnation of the water, the growth and decay of the grass, as has been above described.

The court made the following conclusions of law:

1. The plaintiff is entitled to have the waters of the Little Arkansas river run in its natural channel upon his premises and he is entitled to all the water, and there is no law of this State by which he may be deprived thereof, without his agreement or *laches*.

2. The owner of land upon which there is a stream of water, who without objection sees another divert the water from his premises for manufacturing purposes, and knows that such person is expending large sums of money in the erection of buildings, works and machinery, which will be comparatively of little value without the water so diverted, such owner, by his acquiescence, is held to lose his right to the water, and will not afterward be permitted to assert and maintain such right, so as to occasion great loss to the party so using the water.

3. This rule extends to cases where the results of the diversion of the water are natural, direct and necessary, and does not extend to cases in which the results were unforeseen, and could not be calculated upon with reasonable certainty. In this case the court finds that while Woodman was charged with notice of the erection of the dam, and that the purpose was to divert the water of the Little Arkansas from its natural channel, owing to the peculiarities of the channel, the formation of the surrounding country, and the percolation of the water through the under strata of sand and gravel, he could not calculate with any degree of certainty what amount of water would be diverted, nor could he foresee that the grass would grow and fill the water, and decay, and make his premises undesirable.

4. The owner of the land may also lose his right to the water by lapse of time, if he fails in due time to assert his right, by which third persons are induced to invest money, in the reasonable belief

that no such right will ever be asserted. It is for the court to determine whether, from all the circumstances, it would be inequitable and unjust to allow the assertion of such right, and this is a question addressed largely to the judicial conscience and discretion.

5. In this case the court finds that Woodman has not unreasonably delayed the beginning of his action. It could not have been fairly presumed at the time Thomas and Ellis and Lewis and Farker purchased the mill that Woodman had abandoned his right. It may fairly be presumed, from all the circumstances, that the delay was for the purpose of investigation and trial, in order to determine whether his injuries were such as to entitle him to relief in a court of equity.

6. The court concludes that Woodman is entitled to the relief demanded, and the defendants will be perpetually enjoined from maintaining the dam complained of, and from diverting the water of the Little Arkansas, as charged in the petition.

The plaintiff had judgment below.

H. G. Ruggles, for plaintiffs in error.

Sluss & Hatton, for defendant in error. The facts as proved and admitted by the pleadings do not disclose the existence of a single one of the essential elements of an estoppel. *Flower v. Elwood*, 66 Ill. 447; *Bigelow on Estoppel*, 480; 8 Kans. 189.

Nearly, if not quite, all of the authorities cited on behalf of plaintiffs in error are based upon such a case as where one man, having an interest in land, stands by and sees another, who makes a *bona fide* claim to the same, expend money in the improvement of such land, *in ignorance* of the rights of the other. We find no case holding that one making such improvements *with knowledge* of the rights or claim of another can invoke an estoppel in his favor. The rule is, that there is no estoppel in such case. One who makes expenditures, with the knowledge that another has or claims a right to the property, makes such expenditures at his peril. There is not a case cited which fits the facts of this case.

The point is made, that the defendant in error is estopped to maintain this action by reason of his *laches* in bringing it. What would be unreasonable delay in such a case is a question principally of fact. The court below found that under the circumstances of this case, Woodman was not chargeable with unreasonable delay in bringing his action. Unless the facts are such as to enable this

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court to say that it is clear that the court below erred, the finding upon this point should not be disturbed.

HORTON, C. J. In our view of this case, owing to the conduct of the defendant in error, it is unnecessary to decide what rights the original proprietors of the flouring mill obtained under the condemnation proceedings, instituted by them in 1874, for the purpose of diverting water from the Little Arkansas river into Chisholm creek, or to construe § 1, ch. 66, Comp. Laws 1879, relating to the turning of an adjacent stream or spring into another stream. This leaves only one question for our determination: Whether the defendant in error is estopped by his silence and acquiescence in the construction and continuance of the dam and race-course in controversy, from obtaining the interference of a court, sitting as a court of equity, in his behalf as prayed for by him in his petition? In brief, whether said defendant in error has by *laches*, or his own acts, deprived himself of the right to ask equitable relief? The trial court in its conclusions of law fully recognizes the doctrine that the owner of land may lose his right to the flow of water in its natural channel upon his premises, by permitting others to expend large sums of money in diverting the water for manufacturing purposes, and failing to commence his opposition when he could have done so with justice. An attempt is made, however, to except this case from the general rule, on the theory that where the results of the diversion are unforeseen, and cannot be calculated with reasonable certainty, the rule is not applicable. It may be true, that what a person has acquiesced in the erection of certain works diverting water from its natural flow upon his premises under an erroneous opinion, and in ignorance of the consequences to him, that he is not afterward estopped from all remedy, if at a subsequent period he sustain serious injury, unforeseen when the works were commenced. Generally, a mistake of fact is not binding upon one who acts in ignorance of the real condition of affairs; but if all the parties are equally mistaken in the resultant consequences, another important principle at once enters into the consideration of such cases in the courts, which is: Can the parties be placed in exactly the same situation as they were in when the first act was done by one side and acquiesced in by the others? If that cannot be done, a court of equity will weigh the hardships of

the case, the justice or the injustice of stopping such diversion, and will grant or refuse orders of injunction or for abatement as shall be most in consonance with the equities of all the parties. If possible, the inconveniences of the parties will be regarded; and to balance these inconveniences and the injuries of parties thus acting toward each other, when inconveniences and injuries unexpectedly ensue, equity will generally decline to interfere on either side, but leave the parties to their legal rights and their legal liabilities. In a legal action, damages may be recoverable, in many cases, when the *laches* of a party deprives him of the right to the interposition of equity in his behalf. If we assume that the defendant in error acquiesced in the construction of the dam, race-course and mill, in ignorance of the ultimate consequences, we must also assume that the original proprietors of the mill were equally ignorant; in other words that neither knew the injurious consequences of the diversion of the water into Chisholm creek, and therefore, as both parties were equally mistaken, and cannot be placed in exactly the same situation as they were originally in, equity ought not to interfere on either side, but leave the parties to their legal rights and liabilities. The conclusion, therefore, of the trial court, was erroneous, in holding that the plaintiffs in error should be restrained from maintaining their dam upon the Little Arkansas, and from diverting the water therefrom, notwithstanding the acquiescence and delay of the defendant in error, on the ground that such acquiescence and delay were no bar to the interposition by injunction and like orders, in view of the unforeseen consequences arising from the grass growing and decaying in the river. The findings of fact show that if the orders of the trial court are executed, the waters of Chisholm creek will be valueless as a water-power, the dam and race-course will become useless, and that the mill must be run by steam, if run at all, which will cause loss and expense. Under these orders, all the loss would be thrown upon the plaintiffs in error. This would be greatly inequitable, considering the action of the defendant in error.

Further, the conclusion of the court, set forth in the findings of law, to the effect that the defendant in error was not guilty of unreasonable delay in bringing his suit is not sustained by the findings of fact. By these findings, it appears that in the summer of 1876 he knew the full consequences to his premises of the

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diversion of the water from the Little Arkansas river, and in the fall of that year visited and walked across the dam. Thereafter he could not plead ignorance of the real facts in the case. Yet he permitted the dam in the river to be twice rebuilt to the same height, after the fall of 1876, and made no serious objection. He waited till March, 1878, to commence any legal opposition, and therefore, in our opinion, has been guilty of improper delay in applying to the court for equitable interference in his behalf. He has acted in such a manner as estops him from the assertion of any right to the interposition of a court of equity. Whether he has also deprived himself by his conduct of all legal remedies, we need not now decide. The conclusions we have reached dispose finally of this case. *Bankart v. Houghton*, 27 Beav. 245; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515; *Sheldon v. Rockwell*, 9 Wis. 166; *Tichenor v. Wilson*, 8 N. J. Eq. 197; *Burden v. Stein*, 27 Ala. 104; *Water Lot Co. v. Bucks*, 5 Ga. 315; *Jacox v. Clark*, Walker's Ch. 249; *Sprague v. Steere*, 1 R. I. 247; *Gray v. O. & Pa. R. R. Co.*, 1 Grant's Cases, 412.

The judgment of the District Court will be reversed, and remanded with direction to the court to deny the relief demanded by the defendant in error, and to render judgment in favor of the plaintiffs in error for all costs.

All the justices concurring.

STATE V. THOMPSON.

(23 Kans. 338.)

Evidence — proof of incorporation.

On a criminal trial the existence of a corporation may be proved by general reputation.

CONVICTION of burglary of property of the Atchison and Nebraska Railroad Company. The opinion states the point.

Smith & Solomon, for appellant.

C. K. Wells, county attorney, for the State.

HORTON, C. J. Upon the trial of this case, the State rested without proving or offering to prove the existence of the Atchison & Nebraska Railroad Company as a corporation, and thereupon the defendant interposed his demurrer to the evidence. After some argument, the county attorney asked leave to call a witness to prove the existence of the corporation by reputation, and that the company was doing business as such. The court granted the request, and a witness, one Philip Dunkin, testified as to general reputation, and to the acts and business of said company as a corporation. Counsel allege that all this was error. The court clearly had the right, in its discretion, to receive any competent testimony on the part of the State at the time the evidence complained of was produced (*Crawford v. Furlong*, 21 Kans. 698), and the only question in the case worthy of comment is, whether the testimony received was competent.

[Omitting a statutory consideration.]

The evidence excepted to was both competent and admissible, as the authorities are decisive that in criminal cases, independent of any statutory rule favoring the proposition, the existence of a corporation may be proved by general reputation. A *de facto* existence of the corporation is only necessary to be shown. In *People v. Caryl*, 3 Park. Cr. 326, it was held that on the trial of an indictment for stealing foreign bank bills, that it was not necessary to produce the highest evidence of the existence of the bank, such as proof of the original charter or act of the government incorporating the company; but that proof that there was such a bank *de facto* was sufficient. In *People v. Frank*, 28 Cal. 507, it was said: "Whether the Utah Mining Company was a corporation *de jure* or not was not an issue in the case. If it was acting as such, that was sufficient." The Supreme Court of Indiana used this language: "Surely the property of corporations not lawfully organized, though existing in fact, is not to be declared by this court the legitimate prey of thieves, to be appropriated without criminal responsibility." *Smith v. State*, 28 Ind. 322. And in Ohio, the Supreme Court thus lays down the rule: "'The existence of a corporation may be proved by one who, of his own knowledge, is acquainted with the fact, . . . or by general reputation. . . . The rule springs from necessity, and the absolute impossibility of conviction, in frequent cases, without its adoption.'" *Reed v. State*, 15 Ohio, 217. See, also, *People v. Barric*, 49 Cal. 342; *People v. Davis*, 21 Wend.

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309; *Johnson v. People*, 4 Den. 364; *People v. Chadwick*, 2 Park. Cr. 163; and *Sasser v. State*, 13 Ohio, 453.

The judgment of the District Court will be affirmed.

All the justices concurring.

CENTRAL BRANCH, ETC., RAILROAD CO. V. HENIGH.

(23 Kans. 347.)

Negligence — railroad — trespasser.

A boy, four or five years old, unaccompanied, climbed upon a railroad car, standing alone on a switch-track on a slightly descending grade, with brakes fastened, unfastened the brakes, and thus started the car, and then jumping or falling off, was run over by the car and killed; *held* that there was no liability on the part of the railway company.

THE material parts of the opinion are given in the note, 31 Am. Rep. 210.

HORDER V. HORDER.

(23 Kans. 391.)

Marriage — conveyance by husband to wife.

A voluntary deed from husband to wife is valid as against the husband's adult heir, not dependent on him for support.

PARTITION. The opinion states the case. The plaintiff had judgment below.

J. H. Gillpatrick and Byron Sherry, for plaintiffs in error.

Clough & Wheat, for defendants in error.

VALENTINE, J. This was an action substantially for partition of real estate, and the principal question involved therein is whether a certain deed of conveyance executed by James W. Horder

in his life-time to his wife, Lucy Horder, without further consideration than love and affection, is valid or not, as against an heir of Horder after his death, which heir was of full age at the time of the execution of the deed, and was in no manner dependent upon Horder for subsistence or support.

We have never had occasion to pass upon just such a case as this, but from decisions already made by this court, we think it must follow that the validity of the deed in this case must be sustained. Men of sound minds and not under guardianship should have the privilege of disposing of their property as they please, so long as they do not interfere with the rights of creditors, or of persons dependent upon them for support. We have frequently had occasion to examine into the validity of sales and conveyances from husbands to wives, and we have invariably upheld the validity of such sales and conveyances so far as it was equitable to uphold the same. As throwing light upon this subject, we would refer to the following authorities: *Going v. Orns*, 8 Kans. 85, 87, 88; *Faddis v. Woollomes*, 10 id. 56, 57; *Ogden v. Walters*, 12 id. 282, 290; *Sanderson v. Streeter*, 14 id. 458, 462; *Sproul v. Atchison Nat. Bank*, 22 id. 336, 338. Also, see authorities cited in these cases. Also, see the following additional authorities: *Burdeno v. Amperse*, 14 Mich. 91; *Hunt v. Johnson*, 44 N. Y. 27; s. c., 4 Am. Rep. 631; *Wells v. Wells*, 35 Miss. 639, 664; *Jones v. Obencheim*, 10 Gratt. 259; *Jones v. Clifton*, 17 Am. Law Reg. (N. S.) 713, and cases there cited; *Crooks v. Crooks*, 34 Ohio St. 610.

The judgment of the court below will be reversed, and cause remanded with the order that judgment be rendered in favor of the defendants below for costs.

Judgment reversed.

All the justices concurring.

Morris v. Kennedy.

MORRIS V. KENNEDY.

(23 Kans. 408.)

Payment — check — laches in presenting.

A debtor gave his creditor the check of a third party, payable to bearer and not indorsed, which the creditor kept twenty-six days before presenting it; on presentation it was not paid, owing to the suspension of the bank; the drawer had no funds in the bank at the time of drawing the check, but the president testified that it would have been paid if presented before suspension: the check was not received by the creditor in payment; and being dishonored was returned to the debtor and by him to the drawer, who promised to pay the amount to the debtor; *held*, that the debt was not discharged.

ACTION on account. The opinion states the facts. The plaintiff had judgment below.

Burris & Little, for plaintiffs in error.

Enoch B. Gill and J. P. Hindman, for defendant in error.

BREWER, J. This was an action on an account for corn sold and delivered. The defense was, payment. The sale was for cash, but on January 4, 1878, the defendants, plaintiffs in error, gave to plaintiff a check of J. P. Hall & Co. on the First National Bank of Kansas City. On January 22, 1878, they gave him another check, drawn by the same party upon the same bank. Plaintiff kept both checks till the 30th of January, and then on presentation found that the bank had suspended the day before. Kennedy lived about fifteen miles from Kansas City, and the first time he went to Kansas City after the receipt of the checks was the day he presented them. His excuse for not presenting them before was, that the roads were muddy and he had no business to take him to Kansas City. The checks were returned to defendants a day or two after the suspension. At the time these checks were drawn, Hall & Co. had no funds on deposit to meet them, and when the bank suspended, their account was overdrawn \$943.40. Still, according to the testimony of the president of the bank, these checks would have been paid if presented. The checks were not received as payment, and there was no settlement of the matter after the return of the checks.

We are aware that as to some of the above matters there is contradictory testimony, but there being only a general finding for plaintiff and no special findings of fact, we must take the case as though the trial court believed the above to be the facts rather than the reverse.

Upon these facts, ought the judgment to stand? It is settled that the mere taking of a bank check is not a payment of the debt (*Kermeyer v. Newby*, 14 Kans. 164); and if the check be not paid the party may return it and sue on the original debt. It is also clear that the same strict rule of presentment and notice does not obtain as between the drawer and drawee. The former is not discharged unless he suffers some loss through the delay of the holder in presenting the check. *Gregg v. George*, 16 Kans. 546; 2 Dan. on Neg. Insts., § 1587. Therefore, Hall & Co., the drawers, were clearly not discharged from their obligation to the party to whom they gave their checks, for they have lost nothing. If the checks had been presented and paid, they would simply have owed the bank so much more — the only difference would have been in the person of the creditor.

But it is claimed that a different rule obtains between the defendants, who received the checks from Hall & Co., and the party to whom they transferred them. This is not a question between indorser and indorsee, for the checks were payable to bearer. And it may be conceded that in order to charge an indorser, the same rules as to demand and notice apply as in other paper. 2 Dan. on Neg. Insts., § 1594. It does not appear that defendants received these checks from Hall & Co., as payment of any indebtedness. They were shipping grain to Hall & Co., and these checks, among others, were sent or delivered to them, but so far as appears without any agreement that they should be taken as absolute payment. Again, it appears that Hall & Co., who are now reported as insolvent, did not fail till about June, 1878, and that the defendants continued to have dealings with them after the return of these checks, shipping grain and receiving payment, and that Hall & Co. took back the checks and agreed to pay defendants the amounts for which they called, though in fact they never did make such payment.

The case then stands thus: Plaintiff never received the checks as payment; the checks in fact were not drawn against a deposit in bank, and were therefore no appropriation of funds; there is no

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question between indorser and indorsee; the drawer received back the checks, and promised to pay the sums named therein, and at the time they were able to make good their promise. Under these circumstances, if defendants delayed insisting upon payment till the drawers failed, they must bear the loss, and the plaintiff, who never received the checks as payment and who returned them as soon as they were dishonored, is entitled to recover for his debt. *Kinyon v. Stanton*, 44 Wis. 479; s. c., 28 Am. Rep. 601.

The judgment will be affirmed.

Judgment affirmed.

All the justices concurring.

GRAFFENSTEIN V. EPSTEIN.

(28 Kans. 448.)

Fraud — representation as to market price — when it does not avoid contract.

A false and fraudulent representation of the market price of wool, made by the vendor to induce a sale and relied on by the vendee, will not avoid the contract, where the vendor had no special facilities of ascertaining the market price and there were no special circumstances making it his duty to communicate his knowledge.*

ACTION of damages for breach of contract. The opinion states the case. The plaintiff had judgment below.

Gillet & Forde, for plaintiff in error.

Scott & Lynn, for defendants in error.

BREWER, J. Plaintiffs sued defendant for a breach of the following contract:

“EMPORIA, May 26, 1879.

“I have sold this day to E. Epstein & Co. my wool (1,100 fleeces), at 20 cents per pound, to be delivered at Emporia. Received ten dollars on contract.

WM. GRAFFENSTEIN.”

One ground of defense was as follows:

“3d. For a third defense, defendant says that at the date, to wit,

* See *Kenner v. Harding* (35 Ill. 234), 23 Am. Rep. 615, and references; *Homer v. Perkins* (154 Mass. 431), 26 Am. Rep. 677.

May, 1879, the plaintiffs came to the premises of defendant, and contracted to purchase some wool of defendant at the price of twenty cents per pound, and at the time falsely and fraudulently represented that said price was higher than the market price, they well knowing to the contrary—which representations defendant, not knowing the market price thereof at that time, relied on, and agreed to let them have it at that price; but plaintiffs were wool-buyers at that time, and had been long before, and the fact was that wool had at that time largely advanced, and said sum was much less than the market price, and plaintiffs well knew it at the time; that as soon as defendant discovered the fraud, he declined and refused to comply with the said contract.”

Upon the trial, defendant offered testimony in support of this count in the answer, but the court ruled that the testimony was inadmissible, and this ruling is the error alleged. Counsel for plaintiff in error fairly state the question thus presented to be, “Whether a false and fraudulent representation as to the market price of a commodity made by a purchaser who knows, to a seller who does not know, the market price, to induce a sale more advantageous to the purchaser than he could otherwise get, and which representation is believed and relied on by the seller to his damage, is such a fraudulent representation as avoids his contract of sale?”

This question thus presented must be answered in the negative. It will be noticed, that as stated, the question eliminates two elements which sometimes enter in to affect the force of the misrepresentation, *i. e.*, that of some personal trust or confidential relation, and that of peculiar means of knowledge. Sometimes there are such relations between the parties, or their situations are such, that a peculiar obligation rests on the one who knows to reveal his knowledge. There may be some trust relation between the two, or a recognized habit of dealing in dependence upon the party's statements and representations. In such cases, there is a peculiar duty resting upon the party to disclose the true facts. A confidential adviser, an attorney, a factor, an agent, all hold such relations that they are under special duty to tell the truth, the whole truth, and nothing but the truth. So, where from a long-continued course of dealing the party making the representations knows that the other has become accustomed to act upon his representations, he may not presume upon such confidence to impose a falsehood. So, also, where there are peculiar means of knowledge

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possessed by one and not open to the other, as where a dealer in precious stones trades with one inexperienced and ignorant of the values of such articles. Acquaintance with such values, or the tests of quality, is not acquired at once, or by the mere asking; it requires training and time. So if a dealer knows that a party is confined to his room by injury or disease, and compelled to depend on the information brought to him—and indeed, generally, where the parties cannot, by reasonable care and diligence, place themselves upon equal terms, the law casts a higher obligation to reveal the truth.

None of these elements enter into this case. The article was one of general commerce; there was no special relation of trust or confidence; no peculiar training was prerequisite to a knowledge of values; the market price was a matter of public knowledge, and could be ascertained by any one by reasonable effort and inquiry. Under such circumstances, if the one party chooses to take the statements of the other, and act upon them, rather than make any inquiry as to the market price, he cannot thereafter repudiate his contract on account of the falsity of the statements. “It must appear that the injured party not only did in fact rely upon the fraudulent statement, but had a right to rely upon it in the full belief of its truth, for otherwise it was his own fault or folly, and he cannot ask of the law to relieve him from the consequences.” 2 Pars. on Cont. (3d ed.) 270.

Counsel argue in favor of the rule as they claim it, that it will tend to promote honesty in business transactions, and encourage the confidence which one man should have in another in the statements he makes. It may well be doubted whether, as a matter of public policy, such a rule would be wise; whether it is not better that every one should understand that it is his duty to make reasonable and ordinary effort to acquaint himself with all the facts necessary for his guidance in making a contract before he makes it, and that if he fails to make such effort, he must abide by the contract. Attention to business and prudence in making contracts are of no small importance; inquiry before is vastly better than inquiry after. A disposition, after entering into a contract which proves unfavorable, to search for some means of getting out of it is unfortunate; it encourages misconstruction of statements, misrecollection of words, and willful falsehood. A party who finds on inquiry that he cannot avoid his contract, except by proof of mis-

representations by the other party, is under fully as strong temptation to impute such misrepresentations, as a party seeking a contract is to make them.

But it is scarcely necessary to pursue this question of policy further. We think the law is the other way, and any change in the rule must be made by the legislature. Counsel refer us to no authorities which come squarely up to the rule they contend for. They refer us to four which they claim tend that way. In *Ellis v. Andrew*, 56 N. Y. 83; s. c., 15 Am. Rep. 379, there is an expression in the opinion of the court which seems to countenance this claim, but the expression is *obiter*, and the decision in the case in no manner sustains them. In that case, there was simply a false statement as to the value of the property sold, and it was held that this would not sustain an action of fraud by the purchaser, who relied on this statement. In *Davis v. Jackson*, 23 Ind. 233, the misrepresentation consisted in this, that the seller stated that a stock of goods, about which he knew, while the purchaser did not know, would invoice \$3,500, when it only invoiced \$1,500. An invoice was requested before the purchase, but the seller excused himself therefrom, on the ground of a lack of time. That the court did not intend to depart from their former rulings, hereafter to be noticed, is evident from the fact that they say, that when the term "value" was used, the jury must have understood it as referring to the amount of goods, rather than the prices. In *Lord v. French*, 61 Me. 420, the seller agreed to sell a stock of goods at the Boston prices of similar goods at that date, but fraudulently made out a bill with prices above the Boston prices some \$500, which the purchaser, in ignorance of the fraud, paid for, and then sued, and obtained judgment. On the other hand, in a later case (*Bishop v. Small*, 63 Me. 12), the same court held that an action of deceit will not lie upon a seller's false representations, either as to what a patent right cost him, or at what price he had sold territory rights therefor, or upon his statements as to its merits or prospective profits. The exact question was ruled upon in Indiana, where the Supreme Court held "That misrepresentations by one contracting party to the other, as to the value or quantity of a commodity in market, when correct information on the subject is equally within the power of both parties, with equal diligence, do not, in contemplation of law, constitute fraud. *Foley v. Cowgill*, 5 Blackf. 18. And this rule is followed by that court in *Cronk v. Cole*, 10 Ind.

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485, where it was decided "that it cannot be said that the market value of a commodity is peculiarly within the knowledge of one person more than another, as the channels of information are equally open to all; and a party to a contract of sale of a marketable commodity has no right to rely upon the representations of the other party touching the market value of that commodity." And in support of these views the court cites Chitty on Cont. 681, and the following cases: *Bailey v. Merrill*, 3 Bulstr. 94; *Moore v. Turbeville*, 2 Bibb, 602; and others there referred to. See, also, 2 Kent's Com. 486, and cases cited. And in the latter work we find this statement of the course of decision:

"The cases have gone so far as to hold, that if the seller should even falsely affirm that a particular sum had been bid by others for the property, by which means the purchaser was induced to buy and was deceived as to the value, no relief was to be afforded; for the buyer should have informed himself from proper sources of the value, and it was his own folly to repose on such assertions made by a person whose interest might so readily prompt him to invest the property with exaggerated value. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.*"

We see no error in the ruling, and the judgment will be affirmed.

Judgment affirmed.

All the justices concurring.

 STATE EX REL. MITCHELL V. STEVENS.

(23 Kans. 456.)

Mandamus — to canvassing board — election clearly fraudulent.

A mandamus will not issue to compel a canvassing board to canvass election returns and declare the result, where the returns to the board show that there were 2,947 votes cast, and there were in fact only 800 legal voters in the county.

PROCEEDINGS in mandamus. The opinion states the facts.

S. U. Mitchell, county attorney, *C. S. Bowman*, and *J. W. Ady*, for plaintiff.

Davis & Jetmore, for defendants.

BREWER, J. This is an action of mandamus, to compel the defendants, as canvassing board of the county of Harper, to canvass and declare the result of the election held in November last for county officers, and on the question of the location of the county seat. The defendants, for one ground of defense, return that there were only about 800 legal voters in said county at the date of said election, whereas the returns as made show a vote of 2,947 purporting to have been polled, and that therefore at least 2,147 of such votes were fraudulent and illegal, and that by reason thereof it is impossible to determine and declare the will of the people or the true result of such election. A motion has been made to strike out this portion of the return, and upon that motion the case is submitted to us. This motion is made in no technical spirit, but as counsel agree, that there may be a speedy determination of the substantial questions involved. And we meet counsel in the same spirit. Our general knowledge of matters and events assures us that in an outlying and frontier county like Harper, there is no such number of legal voters, and hence that the return of the commissioners that the large majority of such apparent vote is illegal and fraudulent is substantially correct.

The question therefore presented is not whether, when there have been, or are charged to have been, here and there, illegal votes received, or legal votes rejected, or fraudulent or irregular practices on the part of the officers in any one or more voting precincts, the county board has a right to inquire into the merits of such votes, or the conduct of such officers, but whether, when there are sent in to the canvassing board returns showing such an enormous number of votes as to be perfectly obvious that they are not true returns of legal votes actually cast, but simply manufactured evidences of an attempt to defeat the popular will, this court will, by mandamus, compel the board to accept as true these fraudulent returns and canvass, and declare the result as though they even *prima facie* showed the actual vote. Counsel for relator rely upon the case of *Lewis v. Commissioners*, 16 Kans. 102, in which this court decided that the duty of a canvassing board is substantially ministerial, and that it is not to reject returns regular in form and genuine, on the ground that illegal votes were received, or other frauds practiced at the election; that such matters are to be inquired into by a tribunal for contesting elections, or in *quo warranto* proceedings; while the defendants rely on the case of *State*

v. *Marston*, 6 Kans. 524, in which this court, after a canvass had been made, refused to compel, by mandamus, the commissioners to move their records and keep their office at the place declared by the canvass to be the chosen county seat, on the ground that just such an outrage as appears in this case had been committed in the election. We are clearly of the opinion that the principle of the latter case must control this. It was said in that case, as it has been said in others, that "the writ of mandamus lies, to a great extent, within the discretion of the court where the application is made." Now, while canvassing is a ministerial duty, yet it would be a singular exercise of its discretion for a court whose duty it is to uphold purity, justice, and honest dealing, to give even apparent sanction to such an outrage so gross and so manifest. A canvass is a *prima facie* recognition of the truth of the returns. Compelling a canvass is compelling a *prima facie* recognition of these returns as true statements of the votes cast. But these returns are manifestly rotten and worthless, and the truth is not in them. They do not fail of absolute truth through mere mistake or error. They are an intentional and immense lie. They are without value in any proceeding or in any court, as evidence of votes cast, for while legal and honest votes were cast, yet no court is under obligation to attempt to sift the grain of truth from the mass of falsehood. It is urged that individuals were candidates for office at this election, and that unless a canvass be made there is no way of determining who is elected, and the incumbents thus continue to hold offices which they are not entitled to hold, and for which the people have chosen other persons; that these candidates may be in no manner implicated in the wrong, and hence they should not be deprived of the emoluments of the offices to which they are elected. There may be a hardship in this, but if the returns are not true, how will they show who is elected? If a party can base his right to an office upon nothing other than that which is so manifestly untrue, he can hardly ever expect to obtain or hold it. If it be said that this wrong may only have occurred in the returns from certain precincts, and that the others should have been canvassed, we reply that no such question is here presented. The answer presents the matter as a whole, and as though the wrong was universal. Perhaps if they are returns from any precincts not deserving of this condemnation, they should be canvassed, and the result both as to officers and county seat declared therefrom. Perhaps on the basis

of such unimpeached returns the various successful candidates may by direct proceeding establish their right to office. It will be time enough to consider those questions when properly before us. All we now decide is, that at no stage of the proceedings will this court lend its sanction to an outrage so gross and flagrant as that disclosed by the answer, and never by mandamus compel any other tribunal to accept and recognize as true that which is so manifestly a deliberate and prepared lie.

We might perhaps stop here, but we feel that we should fail in our duty if we did not call the attention of our fellow-citizens to the great wrong disclosed herein, as well as to its demoralizing influences. No such outrage could have been perpetrated without the connivance, if not the open approval, of many. There was a "county-seat fight," it is true, and it is one of the sad things connected with such fights, that the obligation of honesty in elections seems to be so often forgotten. Men, honorable men, will tolerate that which in any matter of private dealing they would scorn. Yet a dishonest vote cast at one election is only the parent of many dishonest votes at another. And the better the men who countenance or even tolerate the one, the larger the number of the offspring. There are men good and true in Harper county, and we appeal to them for the good name of their county, and for the influence upon free institutions and pure elections elsewhere, to see to it in the future that no dishonest vote be polled or false return made, no matter what may be the question or how deeply they may be interested in the result.

With this appeal we close this opinion. The motion to strike out will be overruled, and judgment entered in accordance with the stipulation on file.

Judgment accordingly.

All the justices concurring.

Kelley v. Caplice.

KELLEY V. CAPLICE.

(23 Kana. 474.)

Contract — unconscionable — when not enforced.

A woman and her husband, in consideration of the satisfaction of a demand of \$600 against the husband, and the payment to them of \$275, absolutely assigned to A and B a policy in favor of the woman on her husband's life; A paid the subsequent premiums until maturity, when the amount due was \$1,477.73; the insurers refused to pay it without the woman's receipt on the back of the policy; the woman refused to sign her name without receiving \$477.73 when the policy was collected; accordingly A executed a written agreement to pay her that sum on the payment of the policy; she signed her name, and A and B received the full amount; in an action against them on the agreement, *held*, that it was unconscionable, and not enforceable beyond an amount fairly due for her service and inconvenience in writing her name.

ACTION on the following writing:

“SAINT MARY'S, *May 9, 1878.*

“For and in consideration that Mrs. Eliza Caplice signs and releases all her right, title and interest to and in policy No. 34,169 of Northwestern Mutual Life Insurance Company for \$2,000 on the life of Michael Caplice, for the sole use and benefit of Eliza Caplice, his wife, I hereby agree and bind myself unto the said Eliza Caplice to pay unto her the sum of four hundred and seventy-seven and seventy-three one-hundredths dollars, on the payment of said policy unto P. H. McHale or order, for whom I have power of attorney.

“M. KELLEY.

“Signed in presence of J. W. Fitzgerald.”

“*May 29th, 1878.*

“I, the undersigned, hereby guarantee the payment of the within amount, viz., \$477.73, not later than ten days after the payment of the within-mentioned policy.

P. H. McHALE.”

Defendants pleaded that the paper was obtained by fraud and extortion, and was without consideration. The opinion states other facts. The plaintiff had judgment.

J. S. Merritt, for plaintiffs in error.

Thomas P. Fenlon, for defendant in error.

-HORTON, C. J. In substance, the case is this : On the 11th day of June, 1875, Michael Caplice, the husband of the defendant in error, was indebted to the plaintiffs in error in the sum of \$600. At the time, Michael Caplice had in his possession a certain ten-year endowment policy, issued by the Northwestern Mutual Life Insurance Company, insuring his life for the benefit of his wife, Eliza Caplice, the defendant in error. To pay the indebtedness of \$600, and for \$275 in addition, Michael and Eliza Caplice executed and delivered to P. H. McHale, one of the plaintiffs in error, the following assignment, the same executed in duplicate, to wit :

“SAINT MARY’S, KANS., *June 11, 1875.*

“For a valuable consideration, the receipt whereof is hereby acknowledged, we by this instrument do assign and transfer to P. H. McHale, of Saint Mary’s, Kansas, all our right, title and interest in and to policy No. 34,169, for his sole use and benefit. In case of the death of said assignee before the policy becomes due, then and in that case it shall be payable to the heirs or assigns of P. H. McHale.

“MICHAEL CAPLICE,

[SEAL.]

“ELIZA CAPLICE.”

[SEAL.]

When Michael Caplice took out the policy, he executed to the insurance company ten premium notes of \$82.38 each, and agreed to pay quarterly premiums of \$28.34 each, McHale paid the quarterly premiums and premium notes maturing against the policy after the assignment and transfer. At the execution of the written assignments, the following blank receipt was on the back of the policy, viz.:

“Received _____ 18—, of the Northwestern Mutual Life Insurance Company, _____ dollars, in full of all claims on the within policy.”

This receipt the Caplices did not then sign. The policy matured May 12, 1878. The amount due thereon was \$1,477.73. The plaintiffs in error demanded this sum of the company, but it refused to pay without Mrs. Caplice’s receipt. The latter refused to

sign the receipt without the written agreement. The writing was executed, and Mrs. C. gave her signature to the receipt on the back of the policy.

On the part of the plaintiffs in error, it is claimed that Mrs. Caplice ought not to recover, because it is alleged that it was her moral and legal duty to execute the receipt. On the part of Mrs. C., it is contended that she was under no moral or legal obligation to give her signature; that her signature was purchased for the writing sued on, and that such agreement is valid and binding.

We do not agree with counsel for plaintiffs in error, that Mrs. C. was under a legal duty to sign the receipt. She had previously done all that the law required of her in the assignment and transfer of the policy; she had actually performed every act necessary to put plaintiffs in error in possession of the policy, and every benefit to be derived therefrom. The illustration of the release of a mortgage by the mortgagee is not applicable. By the statute, it is the legal duty of the mortgagee to enter satisfaction on demand of the mortgagor when the mortgage is paid. Independent of the statute, such duty existed, which could have been enforced in a court of chancery against the mortgage, on his refusal to enter a release after payment. On the other hand, neither can we agree with counsel for defendant in error, that the written promise ought to be fully enforced. The agreement is an unreasonable and unconscionable one. Mrs. C. is only entitled to reasonable compensation for the inconvenience of service in making her signature. She suffered no loss, injury or disadvantage, nor parted with any thing of value in signing her name. The demand for the signature of Mrs. C. on the part of the insurance company before payment was arbitrary, and yet out of abundant caution in transacting its business, not very unreasonable. Frequently, insurance policies, especially endowment policies, are hypothecated for the repayment of money, and in such cases just such assignments are executed as appear in this case. On their face they are absolute, yet in fact the transfer is only for security. When the debt is paid, the beneficiary or owner of the policy is entitled to its return. Notwithstanding the execution of such an assignment in the latter instance, the company, after due notice, has no right to pay the pledgee. So, to save any question of this character arising, we suppose the insurance company was anxious to have the signature of Mrs. C. on the policy. Morally, Mrs. C. ought to have given it, without making the extortionate

demand she did. Instead of acting justly, she attempted to take advantage, and an unfair one, of the plaintiffs in error, who had bought and paid for all her right and interest in the policy. She thought herself in a condition to exact an unconscionable bargain, and for service worth only a few cents she demanded and received a written promise for the payment of nearly five hundred dollars. The mind revolts at the enforcement of such a promise and as the courts, as a rule, under such circumstances seize upon the slightest act of oppression or advantage to set at naught a promise thus obtained, we are of opinion that Mrs. C. is only entitled to what may be fairly due her for writing her signature, and that she cannot recover on the agreement. *Hough v. Hunt*, 2 Ohio, 495, and cases there cited. See also the following authorities: *Sasportas v. Jennings*, 1 Bay, 470; *Motz v. Mitchell* (Penn. Sup. Ct.), 21 Alb. L. J., 237; Chitty on Cont. 625.

The judgment of the District Court will therefore be reversed, and the case remanded for a new trial.

Reversed and remanded.

VALENTINE, J., concurring; BREWER, J., taking no part in the decision.

NOTE BY THE REPORTER.—On the subject of unconscionable contracts the two old leading cases seem opposed to the principal case. In *James v. Morgan*, 1 Lev. 111, there was an agreement to buy a horse and pay a barleycorn a nail for every nail in his shoes, doubling every nail, which came, there being thirty-two nails, to five hundred quarters of barley. The plaintiff had judgment on motion in arrest for a fault in the declaration. And in *Thornborow v. Whitacre*, 2 Ld. Raym. 1164, which was *assumpsit*, alleging that in consideration of 26s. 6d. paid, and 4l. 17s. 6d. to be paid, the defendant promised to deliver two rye-corns on the then next Monday, and double in arithmetical progression on every succeeding Monday for a year, which would have required more rye than was grown in the whole year, the court, on demurrer, seemed to consider the contract good, and POWELL, J., said that although it was a foolish one, yet it would hold good in law, and that the defendant ought to pay something for his folly; but no judgment was given, the case being compromised.

But later cases seem to warrant the principal holding:

In *Floyer v. Edwards*, Cowp. 112, Lord MANSFIELD refused a recovery, in an action for money had and received, upon an agreement to pay half a penny an ounce per month in case the price of gold wire sold was not paid in three months, upon the ground that it was "a hard and unconscionable advantage." So in *Jestons v. Brooke*, id. 793, in consideration of a loan of 45l., payable on demand, the lender stipulated for half the profits on a resale of goods which the borrower intended to buy with the money. He demanded payment two hours after the purchase, and put an agent in possession. The profits were 5l. In an action for money had and received Lord MANSFIELD held he could not recover, both because of usury, and because in such an equitable action, founded in conscience, he ought not to "recover such an unmeasurable and exorbitant demand." BULLER, J., also said, "it is clearly great oppression. The consideration therefore is at an end."

In *Cutler v. How*, 8 Mass. 257, the defendant settled an execution against him by his note for 928 bushels of oats payable in oats at 20 cents a bushel, when they were worth 33 to 37

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cents. This was held unconscionable, and the jury was instructed in assessing damages to value the oats at 20 cents. To same effect, *Cutler v. Johnson*, id. 266. In *Baxter v. Wales*, 12 id. 365, an agreement to pay \$6 a year for the use of a cow was held unconscionable.

In *Wilkinson v. Olivetra*, 1 Scott, 461, an agreement to give plaintiff 1,000*l.* for a letter, by means of which defendant was enabled to end certain disputes and recover certain property, was held valid.

In *Minles v. Cowley*, 8 Scott, 620, an agreement whereby one agreed to give his son 500*l.* on his marriage, and the other agreed to give his daughter 200*l.* on her marriage, was held valid. The court so held "with infinite reluctance against the parties who so foolishly signed the agreement." In *Prebble v. Boghurst*, 1 Swanst. 829, the court say of a similar agreement: "Unless hardship arises to a degree of inconvenience and absurdity so great that the court can judicially say, such cannot be the meaning of the parties, it cannot influence the decision."

In *Green v. Tweed*, 13 Abb. Pr. (N. S.) 497 (New York Common Pleas), the defendant agreed to furnish his biography to the plaintiff for publication, within a fixed time, and for every day's delay beyond, to pay \$165. Suit was brought to recover for 161 days' delay. The court said: "The award of \$26,565 as liquidated damages for the failure for 161 days to furnish a sketch of defendant's life for publication in this 'Universal Biography,' which plaintiff subsequently published (without defendant's biography), is so monstrous and extravagant that it would be a reproach to the administration of justice to countenance or uphold it." "First, the contract, if it be construed as claimed, according to its literal terms, is well described in the language of Judge STORY (1 Story's Eq. Jur., § 188), as 'such as no man in his senses, and not under delusion would make, on the one hand, and as no honest or fair man would accept, on the other. It is so extortionate and unjust that it raises the presumption of deceit and fraud in its inception.'" "Even courts of law take notice of the inequitable and unconscientious character of such agreements, declare them void, and remit the claimant to such damages as afford him a reasonable and just compensation for any injury he has sustained."

The point of inadequacy of consideration has been much considered in equity cases.

In *Wormack v. Rogers*, 9 Ga. 60, and *Judge v. Wilkins*, 19 Ala. 765, it was held that mere inadequacy of consideration is not sufficient ground for setting aside a contract or granting relief against it in equity. In the latter case the court say: "There must be something else beside the mere inadequacy of consideration or inequality in the bargain, to justify a court in granting relief by setting aside the contract. What this something else beside the inadequacy should be, perhaps no court ought to say, lest the wary and cunning, by employing other means than those named, should escape with their fraudulent gains. I however will venture to say, that it ought, in connection with the inadequacy of consideration, to superinduce the belief that there had been either a suppression of the truth, the suggestion of falsehood, the abuse of confidence, a violation of duty arising out of some fiduciary relation between the parties, the exercise of undue influence, or the taking of an unjust or inequitable advantage of one whose peculiar situation at the time would be calculated to render him an easy prey to the cunning and the artful. But if no one of these appears, or if no fact is proved that will lead the mind to the conclusion that the party against whom relief is sought has suppressed some fact that he ought to have disclosed, or that he has suggested some falsehood, or abused in some manner the confidence reposed in him, or that some fiduciary relation existed between the parties, or that the party complaining was under his influence, or at the time of the trade was in a condition, from any cause, that would render him an easy victim to the unconscientious, then relief cannot be afforded: for inadequacy of consideration, standing alone and unsupported by any thing else, can authorize no court governed by the rules of the English law, to set aside a contract." The same is held in *Birdsong v. Birdsong*, 2 Head, 290, where it is said that inadequacy of consideration is only a badge of fraud. Here the consideration was one-third of the real value.

In *Osgood v. Franklin*, 2 Johns. Ch. 23 (7 Am. Dec. 513), Chancellor KENT said: "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties standing on equal ground and dealing with each other without any imposition or oppression. And the inequality, amounting to fraud,

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must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense. There is a very important distinction, which runs through the cases, between ordering a contract to be rescinded, and decreeing a specific performance. Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded (unless its grossness amount to fraud), yet it may be sufficient for the court to refuse to enforce performance. It is not an uncommon case for the court to refuse to enforce, for inadequacy, and at the same time refuse to rescind." "The doctrine is settled, that in setting aside contracts, on account of inadequate consideration, the ground is fraud arising from gross inequality. Unless the inadequacy does, of itself, *ex eidentia verum*, prove fraud, the rule is, says Ch. B. MACDONALD (1 Wightwick, 109), that inadequacy, by itself, has not the weight suggested."

In *Adm'r of Hough v. Hunt*, 2 Ham. 501, where a person deeply in debt, to obtain a loan, agreed to purchase a tract of land at more than double its value, and gave a mortgage as security for loan and purchase, the vendor knowing the vendee's necessities, a court of equity rescinded the contract. The court said: "Where the inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage, to rescind the contract." The like holding was made in *Cockell v. Taylor*, 15 Beav. 103, where in consideration of a loan of 1,000*l.* the borrower agreed to purchase land at ten times its price. The court said mere inadequacy of price will not avoid a contract, but "It is, in fact, evidence of fraud, but standing alone, by no means conclusive evidence; and if a purchaser with his eyes open, without concealment or deception on the part of the seller, choose to give ten times the value of the property it is far from my intention to say any thing that can lead to the supposition that this transaction can be impugned."

In *Seymour v. Delaney*, 3 Cow. 444 (15 Am. Dec. 270), is a learned review of authorities, and the court conclude that equity is not bound to decree performance where the bargain is hard and unconscionable, but this does not follow from the price being inadequate, unless the inadequacy is so gross as to evince fraud. This was held in the Court of Errors by a vote of 14 to 10, reversing the chancellor's decree. The holding is followed in *Parmelee v. Cameron*, 41 N. Y. 396.

The following is an abstract of *Mots v. Mitchell*, *supra*, decided Oct. 6, 1872, and referred to in the principal case:

"Where one obtained possession of a deed of land, and used it for the purpose of extorting money from the person who claimed title to the land as the price of its preservation, or of permission to use it in defending his title, and by threats, express or implied, gave such person to understand that the deed would be withheld or destroyed unless his demand was complied with, a payment made in consequence should be deemed involuntary, and the wrong-doer should be compelled to make restitution. The general rule, as stated in Chitty on Contracts, 625, 'seems to be that the payment of money by the owner of goods, in order to redeem them from the hands of a person who unlawfully withholds them and demands such money, may be treated as a compulsory payment, so that the amount is recoverable as having been obtained by oppressive means. The owner of the goods may have so urgent occasion for them that the ordinary action may afford very imperfect redress.' In *Miller v. Miller*, 18 P. F. Smith, 486, it is said, that in civil cases the rule as to duress *per minas* has a broader application at the present day than formerly. Where a party has the property of another in his power, so as to enable him to exert his control over it to the prejudice of the owner, a threat to use this control may be in the nature of the common-law duress *per minas*, and enable the person threatened with this pernicious control to avoid a bond or note obtained without consideration by means of such threats. The constraint that takes away free agency, and destroys the power of withholding assent to a contract, must be one that is imminent and without immediate means of prevention, and such as would operate on the mind of a person of reasonable firmness. As it is expressed in *Astly v. Reynolds*, 1 Strange, 915, the rule *volenti non fit injuria* is applied only 'where the party had his freedom of exercising his will.' The same general principle is also recognized in *Colwell v. Peden*, 3 Watts, 327; *Foshey v. Ferguson*, 5 Hill, 154; *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westberg*, 2 id. 211."

Best v. Crall.

BEST V. CRALL.

(23 Kans. 482.)

Negotiable instrument — payment of promissory note — when no discharge.

The payee of a note indorsed and delivered it, before maturity, to a bank, as collateral security for a demand of the plaintiff; subsequently, but before maturity, the maker paid it to the payee, not knowing of the transfer, and took a receipt; *held*, that the note was not thereby discharged.

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

S. H. Glenn and Greenlee & Jackson, for plaintiffs in error.

Everest & Waggener, for defendant in error.

BREWER, J. This was an action and judgment on a promissory note, dated March 24, 1873, and due in eighteen months, executed by defendants to one George Lamberson, Jr., and by him indorsed to Crall, the plaintiff. The note was in form an ordinary negotiable note.

On the 24th of April, 1873, Crall sold to said Lamberson, Jr., a buggy and harness, for \$290, which, by the terms of the contract (which was in writing), might be paid for in hay at a stipulated price, which hay was to be delivered by Lamberson, Jr., from time to time, up to March 1st, 1874. As security to Crall that Lamberson, Jr., should perform his part of the contract and deliver the hay, or otherwise pay for the buggy and harness as per their written contract, Lamberson, Jr., agreed with Crall in their written agreement that Lamberson, Jr., should deposit certain notes at the Exchange bank of Wm. Hetherington & Son, in the city of Atchison, as collateral security for the faithful performance of the contract. This part of the agreement reads as follows, viz. :

“ It is agreed that the said George Lamberson, Jr., shall deposit certain notes as collateral security for the faithful performance of his obligation in this contract, which notes are to be deposited at the Exchange bank of Wm. Hetherington & Son, and so to remain for the benefit and security of the said Crall until the fulfillment of this contract ; and in the event of failure by said Lamberson, the

said Crall may and shail have the right to collect the same to the amount that may be due him in the premises. In witness whereof, the said parties," etc.

In pursuance of this agreement, as shown by Crall's evidence, the notes with the written agreement were inclosed in an envelope, sealed up, and deposited in Hetherington & Son's bank, on the 24th day of April, 1873, and among other notes so deposited were two notes sued on in this action, upon one of which the defendant in error, Crall, obtained this judgment, which the plaintiffs in error seek to reverse.

The statute of limitations defeated the claim in the other note. The defense interposed was payment to Lamberson, made before the maturity of this note, and without knowledge of any transfer. The court refused to permit evidence of such payment, and this presents the question for our consideration. We think the ruling of the court correct. There is no question but that the note was indorsed at the time it was placed in the bank as collateral, and none that the payee failed to deliver the hay, except about three tons, or make other payment; so that Crall had a valid claim for much more than the amount of this note, and for which this note was indorsed and transferred as collateral security. The notes were afterward, by consent of Lamberson and Crall, taken from the bank, and left with Crall. There is some little uncertainty as to the time when this was done, but we think this immaterial, and that the ruling would have been correct even if the notes had remained in Hetherington's bank up to the time of suit. By the indorsement, the legal title was transferred, and Crall was by the contract given the right to collect up to the amount due him for the buggy and harness. In 1 Daniel on Negotiable Instruments, § 824, the author says :

“ When the note or bill of a third party, payable to order, is indorsed as collateral security for a debt contracted at the time of such indorsement, the indorsee is a *bona fide* holder for value in the usual course of business, and is entitled to protection against equities, offsets, and other defenses available between antecedent parties, provided, of course, that the bill or note transferred as collateral security is itself, at the time, not overdue.”

There is no pretense that Lamberson had the note at the time of payment to him, or that he was authorized by Crall to receive the money. Crall had done nothing to mislead the makers, noth-

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ing upon which to base any estoppel against him. Now a maker of a negotiable note, who, before its maturity, pays the payee the amount thereof without a surrender of the note, does so at his peril. If the payee is no longer the holder, or entitled to receive the money, the payment in no manner discharges the paper, or prevents the real holder from recovering upon it. The case of *Davis v. Miller*, 14 Gratt. 13, is still stronger. In that case, the indorsement was after maturity and protest for non-payment. After transfer, payment was made to the indorser and receipt taken. The maker had no notice of the transfer till after the payment. It was held that the payment was no defense. In the opinion, MONCURE, J., uses this language :

“ On the other hand, however, it may be answered that no case can be found in which it has been decided, or even said, that payment to an indorser after an indorsement is a good defense against the indorsee. That no decision can be found the other way, is well accounted for by the fact that the payment of a negotiable note is very rarely made without taking in the note, or having the payment, if partial, indorsed thereon, and no occasion has therefore occurred for a decision of the question. That no such occasion has occurred is in itself an argument in favor of the defendant in error. * * * There is at least as much reason in holding the maker of a note responsible for want of caution in making a payment, as for holding a purchaser responsible for want of caution in making a purchase. Indeed, there is more, for due caution will always protect the former against an improper payment, while the greatest caution may not protect the latter against an improper purchase. The former is always safe in making payment to the legal holder of the note, which he may thereupon require to be produced and surrendered to him, while the latter is often deceived by a false possession, and must at his peril look to the title, which may be separate from the possession.” See also *Coffman v. Bank*, 41 Miss. 212

The case of *McCrum v. Corby*, 11 Kans. 464, is not in point, for in that there was no indorsement. Here the paper was regularly indorsed. Nor is this indorsement one which simply constituted the holder, agent of the indorser, such an indorsement as is spoken of in 1 Dan. on Neg. Inst., § 822, to which we are referred by counsel. For this transfer was irrevocable. The indorser had no control of the paper, could acquire none except by payment of the

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debt for which the paper was pledged. Whether the legal title passed directly to Crall, or to the bank as trustee for his benefit, is immaterial. It had passed away from Lamberson, and he held neither legal title nor equitable right to the proceeds. Therefore payment to him was to one without actual right to receive it, and without possession of any evidence of title or right to receive payment. Conceding, as counsel contend, that the indorsement is to be construed along with the agreement as really one transaction and one instrument, yet such an indorsement passes title, and except as limited by the restriction, cuts off all equities. The note was indorsed as security for Lamberson's debt to Crall, a debt contracted at the time of the indorsement. That debt is unpaid, and Crall has a right to recover.

The judgment will be affirmed.

All the justices concurring.

Judgment affirmed.

SMITH V. GORE.

(23 KANS. 488.)

Homestead — when proceeds of sale of, not exempt.

The proceeds of the sale of a homestead are not exempt from execution, unless the vendor has at the time of sale the intention of investing them in another homestead.

THE opinion states the case.

H. T. Green, for plaintiff in error.

L. B. Wheat, Thos. F. Fenlon, C. F. W. Dassler, and J. D. Shafer, for defendants in error.

VALENTINE, J. This was an action to subject a certain note and mortgage held by Henry D. Smith against Michael McDonald to the payment of a certain judgment held by Emory E. Gore against Henry D. Smith. Gore commenced the action against

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Smith and McDonald, and made various other persons parties defendant. Smith, however, was the only real party defendant, and he is now the only plaintiff in error. All the other parties were and are satisfied with the judgment rendered by the court below. The only defense to the action was and is, that said note and mortgage were given in part consideration for Smith's homestead, on a sale and conveyance thereof. The facts of the case are substantially as follows :

On October 17, 1876, and prior thereto, Smith owned a certain piece of land, which he then occupied as his homestead. On that day he sold said homestead to Michael McDonald, and in consideration therefor McDonald then paid him \$3,500 in cash, and gave him his promissory note and mortgage for \$1,037.50 more. This note was dated October 17, 1876, and was to become due in two years after date, or on October 17, 1878. Smith used said \$3,500 in paying debts, and in supporting his family. On March 1, 1877, Smith removed from said land, and moved upon another piece of land, which he rented and occupied with his family for one year. He then moved upon another piece of land with his family, which land he occupied for about nine months. He then removed into Leavenworth city, and he and his family occupied a house in that city which was partly occupied by another family. At the time of the trial of this case, which was September 3, 1879, he with his two minor children was living with his son-in-law, and his wife was staying with her father. This action was commenced on February 8, 1879. On September 3, 1879, it was tried. On the trial, Smith testified that "he (H. D. Smith) expects and intends to use the proceeds of that note and mortgage — that is, the money due on it — to buy another small farm, to live on as a home for himself and family." Whether at any time previous to the trial, Smith ever expected or intended to use the money due on said note and mortgage to purchase another homestead, is not shown. The foregoing is all the evidence that tended to show that he ever at any time had any such expectation or intention. Smith never purchased or owned any land after selling his homestead, and there is nothing in the record, except the words above quoted, that shows, or tends to show, that he at any time had any desire or wish to purchase, or any expectation of purchasing, any more land. Under these circumstances, we do not think that the money due on said note and mortgage is exempt from the payment of Smith's debts.

It is true that this court has decided that the proceeds of a homestead sold at forced sale by a sheriff are exempt from the payment of all debts which are not liens upon the homestead, so long as the debtor expects and intends to use such proceeds in procuring another homestead. *Mitchell v. Milhoan*, 11 Kans. 617. And this doctrine probably ought to be extended to cases where the sale of the homestead is made voluntarily by the owner of the homestead himself. *Watkins v. Blatcheschinski*, 40 Wis. 347. But we think the intention to use the proceeds in procuring another homestead should be formed at or before the time of the sale, and the intention should be to procure another homestead with the proceeds immediately. It would not do to form the intention two years after the sale, nor would a present intention to procure the homestead two years afterward be sufficient. If the party himself supposed that he could get along without a homestead, the law would not protect his money or his credits, and exempt them from the payment of his debts, merely because it supposed he needed a homestead. The law does not, *in express terms*, in any case exempt money or credits, merely because they are proceeds of a homestead. They are exempted only by a sort of equitable fiction drawn from the spirit of the homestead-exemption laws, and adopted for the purpose of enabling persons to change their homesteads when they desire. This sort of exemption, however, is not allowed in several of the States. *Thompson on Homesteads*, § 748 to § 751. In this State the homestead-exemption laws are construed liberally; but giving to them the most liberal construction, the plaintiff in error is not entitled to have the money due on said note and mortgage exempted from the payment of his debts.

Under the circumstances of this case, we think the present action may be maintained. Civil Code, § 481. Except for this note and mortgage, it was shown that Smith was wholly insolvent, and entirely execution-proof. Different executions had been issued against him, and returned not satisfied.

The judgment of the court below will be affirmed.

All the justices concurring.

Judgment affirmed.

Comstock v. Adams.

COMSTOCK V. ADAMS.

(28 Kans. 513.)

Marriage — divorce — annulling decree, effect of.

The annulling of a decree of divorce replaces the parties in the state in which they were before the divorce, without regard to a subsequent marriage and the birth of children; an agreement between the parties to the contrary is of no effect; and where the divorce was granted by the court of another State, it will be presumed that the annulling of the decree by the same court is regular and valid.

ACTION to set aside a will executed by Ira Comstock, and to procure a decree declaring the plaintiff to be the owner of one-half of all the property of which the said Ira Comstock died seized. The court below made the following findings of fact and conclusions of law.

“1. That Ira Comstock and Avis F. Comstock were married in the State of New York, in 1844, and lived together as husband and wife until the year 1862, when they separated in the State of New York. The result of such marriage was four children, named respectively Hiram Frank, Emma, Jennie, and Willie, who are defendants therein.

“2. That in 1865, Ira Comstock removed to the State of Michigan, from the State of Pennsylvania, and settled in Van Buren county in said State, and in a few weeks thereafter the defendant Loretta Adams removed from the same place, in the State of Pennsylvania, and settled in Van Buren county, Michigan, at or near the residence of Ira Comstock.

“3. That the said Ira Comstock and Loretta Adams, *alias* Comstock, after such settlement in Michigan, lived together until their subsequent marriage, as hereinafter found.

“4. That on January 2, 1867, by a decree of the Circuit Court of Van Buren county, Michigan, upon service by publication against said Avis F. Comstock, said Ira Comstock was upon his bill divorced from said Avis F. Comstock.

“5. That on January 8, 1867, the said Ira Comstock and Loretta Adams, or Comstock, were married in Van Buren county, Michigan, the issue of which said marriage was three children, named respectively, Fred, Dick and the ‘baby,’ who are defendants herein.

"5½. That on the 13th day of September, 1867, after Ira Comstock had obtained his divorce, and before any proceedings had been taken to reverse the same, and after he and Loretta Adams were married, the said Ira and Avis F. Comstock entered into a written agreement, the terms of which were, that for the sum of \$500, to be paid to Avis by Ira, Avis F. Comstock agreed to surrender her right and interest in and to the property, personal and real, of the said Ira, and also agreed to take no steps or proceedings, nor to institute any suit to invalidate, set aside or annul the divorce granted to Ira, or the marriage between Ira and Loretta; that Ira paid \$75 on said contract, and executed a mortgage to Avis for the remainder, which afterward turned out to be worthless, and no further payment of said sum of \$500, other than the \$75, has ever been made or tendered by Ira.

"6. That on October 21, 1868, by proceedings had in said Circuit Court of Van Buren county, Michigan, on the chancery side thereof, being the same court in which the aforementioned decree of divorce was granted (which proceedings were substituted and filed in said court on the 1st day of November, 1867), said decree was, upon and after personal service and notice to said Ira Comstock, upon the application of said Avis F. Comstock, set aside and annulled.

"7. That in 1871, Ira Comstock and Loretta Adams, or Comstock, removed to Marion county, Kansas, and continued to live together there as husband and wife, until his death, as hereinafter found.

"8. That said plaintiff, Avis F. Comstock, has never married since the separation of herself and said Ira Comstock.

"9. That said Ira Comstock died, in Marion county, Kansas, November 12th, 1875, leaving a will, a true copy of which is annexed to plaintiff's petition, which said will has been duly admitted to probate in said Marion county, Kansas.

"10. That said Ira Comstock died seized of personal property to the amount of \$1,355.65.

"11. That said Ira Comstock died seized of certain real estate situate in Marion county, Kansas, part of which was a homestead under the laws of the State of Kansas, and that such homestead was occupied by himself and Loretta Adams, *alias* Comstock, and their children, Fred, Dick, and the 'baby,' and Hiram Frank, a son of himself and Avis F. Comstock.

"12. That said real estate was the accumulation of the joint

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labor, service and money of said Ira Comstock and Loretta Adams, *alias* Comstock.

“13. That said Loretta Adams, or Comstock, was not a party in any way or manner in the procurement of the divorce of Ira Comstock from Avis F. Comstock.

“14. That said plaintiff, Avis F. Comstock, never has consented in writing or otherwise to any of the terms of said will of said Ira Comstock.

“15. That said plaintiff, Avis F. Comstock, has never been a resident of the State of Kansas.

“16. That said defendant, Loretta Adams, *alias* Comstock, is the executrix of said last will and testament and of the estate of said Ira Comstock.”

From which said matters of fact the court concludes :

“1. That the marriage of Ira Comstock and Loretta Comstock was a valid marriage within the jurisdiction of the State of Michigan, until the same was set aside and annulled by the proceedings had by Avis F. Comstock.

“2. That upon the annulment and setting aside of said decree of divorce, the marriage of said Ira and Loretta Comstock, or Adams, was set aside and annulled, and the relation of husband and wife between said Ira and Avis restored, and the same thereafter continued to exist until the time of said Ira's death.

“3. That by reason of the non-residence of Avis F. Comstock in Kansas, Ira Comstock had the right to exclude her from any interest in his real estate in Kansas, by will.

“4. That by reason of the joint occupancy of Ira Comstock and Loretta Adams, or Comstock, in the homestead, and the non-residence of Avis F. Comstock, Ira had the right to devise said homestead by will to said Loretta.

“5. That by reason of the real estate having been the joint accumulation of the money and labor of Ira Comstock and Loretta Adams, or Comstock, the said Ira had the right to devise the same to said Loretta to the exclusion of said Avis, she being a non-resident of the State of Kansas.

“6. That the said plaintiff, Avis F. Comstock, as the widow of said Ira Comstock, is entitled to a selection from the personal estate of said Ira Comstock of the property allowed her by section 49, chapter 37 of the general statutes of this State, and in addition thereto,

one-half of the remainder of said personal property not necessary to the payment of the debts of said decedent."

The court decreed that said will be, as to the plaintiff, set aside as to the personal estate belonging to him at the time of his death, and that the plaintiff is the owner of all the property allowed by law to her as the widow of Ira Comstock. The plaintiff appealed.

Buck & Kellogg, and *Frank Doster*, for plaintiff in error.

J. G. Waters, for defendants in error.

VALENTINE, J. As this court is inclined to agree with the plaintiff in error in this case, it will be proper for us to set forth and discuss the questions which the defendants in error claim are involved in the case. Such questions are as follows :

"*First*. Does a marriage remain valid, after decree rendered, leaving the party fully competent to marry, upon and after review of the decree of divorce and its annulment? *Second*. Is not the contract made between Ira Comstock and Avis F. Comstock a valid one, and does it not conclude the plaintiff in error in this action? *Third*. Had not Ira Comstock the right to exclude, by will, his first wife, Avis F. Comstock, from participation in his real estate, she having always been a non-resident of the State of Kansas? *Fourth*. What authority has the Michigan court to set aside the divorce?"

The answers to all the foregoing questions must, as we think, be against the plaintiff.

I. Upon principle and authority, the first question must be answered in the negative. 2 Bish. on Mar. and Div., §§ 753, 753a; *Crouch v. Crouch*, 30 Wis. 667. When a decree of divorce is set aside and annulled, the marital relations of the parties are placed back in just the same condition as they were before the divorce was granted, and it can make no difference that the party to whom the divorce was granted has married in the mean time, or that a child had been born as the fruit of this second marriage; for the courts cannot be divested of their power to set aside decrees of divorce by the acts of the party procuring the divorce, or by the acts of third persons. All persons are bound to know the law, and all persons are bound to know the power of courts to set aside and annul decrees of divorce; and knowing all this, if any man and woman (one of whom has been wrongfully divorced from a former husband or

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wife) choose to take the hazardous risk of being married to each other before the divorce has become final and conclusive by lapse of time, such man and woman must be prepared to endure all the consequences of a final revocation and annulment of the decree of divorce, provided such decree shall ever be annulled. A party to a decree of divorce obtained by fraud cannot defeat the power and jurisdiction of the court to set aside such decree by consummating a second marriage on the next day after the decree is granted, and the person to whom such party is married has no more power to defeat the exercise of the jurisdiction of the court in such cases by such a hasty marriage than the party has. There can be no innocent parties in such cases. In the present case, the second marriage was consummated in just six days after the decree was rendered. Where a decree of divorce is rightfully and properly obtained, there is no danger of its ever being set aside or vacated. It is only where the decree has been wrongfully or fraudulently obtained, that it may be set aside.

II. Said contract between Ira Comstock and Avis F. Comstock was against public policy, and therefore void. Even Ira Comstock himself seems to have thought so ; for after paying the \$75 which he paid at the time of making the contract, he forever abandoned the contract, and never afterward fulfilled any of its terms. Said contract was against public policy, and void, because the principal consideration therefor was, that Avis F. Comstock should refrain from all disturbance or molestation of said decree of divorce, which decree of divorce (it must be presumed from the fact that it was afterward set aside) was obtained illegally and wrongfully. As society has an interest in marriages and divorces, the public will not allow individuals to make valid contracts to uphold and sustain illegal and fraudulent divorces. Probably no estoppel could be set up in any case, and certainly not in this case ; for in this case the second marriage was had long before this contract was made, and not in pursuance thereof.

Now while we think that said contract was void, still would the defendants be in any better condition if it were valid ? If it were valid, then Ira Comstock should have interposed it as a defense to the plaintiff's proceeding to set aside said decree of divorce. Whether he did so interpose or not, we cannot tell from the record brought to this court ; but whether he did or not, we think the judgment setting aside said decree of divorce is equally conclusive against

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him, and that judgment virtually overturns and destroys the contract. Although Avis F. Comstock agreed that she would not disturb said decree of divorce, yet she in fact did disturb it, and the decree was set aside and that is the end of the matter. When the decree was set aside, she again became the wife of Ira Comstock, with all the rights, privileges and duties of other wives.

[Omitting the third point.]

IV. In the absence of any thing to the contrary, it must be presumed that the Michigan Circuit Court, which granted and set aside said divorce, had ample authority and jurisdiction to do the same. *Dodge v. Coffin*, 15 Kans. 277, 280, 284-287: It was a court of general jurisdiction (Mich. Const., art. 6, § 8); and presumptively, it had sufficient jurisdiction to set aside one of its own decrees. Besides, the evidence introduced in the court below may have shown conclusively that it had such jurisdiction. None of the evidence has been brought to this court and therefore we cannot say that it did not so show.

It follows from the foregoing, that the plaintiff, Avis F. Comstock, is entitled to one-half of all the property of Ira Comstock, deceased, not necessary for the payment of debts. The other half of said property should be disposed of in accordance with the terms of the said will of Ira Comstock.

The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

All the justices concurring.

LAPERE V. LUCKEY.

(28 Kans. 534.)

Ancient lights.

The doctrine of ancient lights does not prevail in Kansas.*

ACTION for obstruction of light and air. The opinion states the case. The defendant had judgment below.

* To same effect, *Ray v. Sweetney* (14 Bush, 1); 29 Am. Rep. 388, and note, 399; *Rennysen's Appeal*, Penn. Sup. Ct., March, 1880, 21, Alb. L. J. 483.

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Greenlee & Jackson, for plaintiff in error.

S. H. Glenn, for defendant in error.

VALENTINE, J. The plaintiff in error states the facts of this case as follows :

On the 21st day of May, 1879, the plaintiff in error, as plaintiff, made and filed in the District Court in and for Atchison county, Kansas, his petition against the defendant, in which he charged that he was in possession, under a lease, of the Lindell hotel, located on lot 7, in block 28, in the city of Atchison ; that in order to properly carry on the business of said hotel, it was necessary to use the basement of the building for the purpose of a laundry ; that he had fitted up the south fifty feet of said basement as a laundry, at an expense of about \$500 ; that his leasehold interest in said building, and the furniture owned by him therein, was of the value of \$8,000.

He further alleged that it was necessary, in order to properly use said basement, to have the light and the air from the whole of the east side of such basement, and that plaintiff is entitled to the light and air from the whole of the east side of said basement ; and that well knowing the plaintiff's right in the premises, said defendant wrongfully and illegally, about the month of October, 1878, erected and put up a high board obstruction, greatly injuring plaintiff ; that on or about the 31st of May, 1879, said defendant wrongfully and unlawfully threw down the fence along the south part of such basement, and is threatening to put up and maintain along the east side of said basement, for the length of about sixty feet, a board obstruction of the height of about sixteen feet, thereby wrongfully, unlawfully, maliciously and wickedly cutting off the air and light from plaintiff's laundry and basement, as he is rightfully entitled to enjoy.

[Omitting a matter of practice.]

Defendant filed a demurrer to plaintiff's petition, alleging that the said petition does not state facts sufficient to constitute a cause of action of any kind in favor of plaintiff and against defendant ; and does not state sufficient facts upon which to base an order of injunction, either temporary or otherwise.

The court sustained the same, and the plaintiff brings the case here for review.

This statement of the facts of the case is at least fair toward the plaintiff in error.

Did the court below commit any error? We think not.

[Omitting an immaterial point.]

In the plaintiff's petition there was a conspicuous absence of important facts, which we would naturally expect to see in such a petition. There was apparently labored effort to avoid stating some of the facts which should have been stated in detail. No one can tell from the petition who owned the land where the defendant was engaged in tearing down and building up fences. The plaintiff does not say that he owned it, or had any lease thereon, and he does not say that the defendant did not own it, or that he did not have full and complete control thereof. The facts of the case, as shown from the petition and said affidavits, are that the plaintiff had a lease of the hotel, and full charge thereof, while the defendant owned the land where he was at work tearing down and building up fences, and had complete charge thereof. The plaintiff's allegation, in his petition, that the defendant was "thereby wrongfully, unlawfully, maliciously and wickedly cutting off the air and light from the plaintiff's laundry and basement, as he is rightfully entitled to enjoy," was evidently based upon an erroneous supposition, that because the plaintiff had leased the hotel from somebody, he thereby had the unquestioned right to all the air and light from all the surrounding country, unobstructed, undisturbed and uninterrupted by anybody, or from any source. He evidently did not take into due consideration the rights of others who might fortunately or unfortunately have property near him, or in that vicinity; and hence his omission of these very important facts. Now, in the absence of these facts, we think the court below did right in sustaining said demurrer. Inadvertent omissions of facts from a pleading, especially where the omitted facts are unimportant, or where they may be covered by broad and general allegations, are generally looked upon leniently by the courts, and especially so after verdict; but a studious omission of important facts from a pleading cannot be favored; and this is especially true where the pleading is attacked before trial, and by demurrer. It is an old rule, that upon a demurrer only such facts as are well pleaded can be considered as true. And in such a case as this, we think the rule ought to be strictly adhered to.

We suppose that there can be no such thing as "ancient lights"

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in Kansas ; and that the doctrine of "ancient lights" cannot be recognized by our courts. And hence a petition which sets forth nothing else for a cause of action than the obstruction of "ancient lights," does not state any cause of action.

The judgment of the court below will be affirmed.

Judgment affirmed.

All the justices concurring.

HOGAN V. MANNERS.

(23 Kans. 551.)

Homestead exemptions — leased land — partly used for business.

A homestead may be acquired in a building erected on leased land, and although one or two rooms are used for business purposes.

ACTION to foreclose a chattel mortgage on a frame house. The opinion states the facts. The foreclosure was denied below.

Bergen & Whitford, for plaintiff in error.

W. A. Johnson and *H. L. Poplin*, for defendants in error.

BREWER, J. This was an action to foreclose a mortgage given by defendant in error, G. A. Manners, to plaintiff in error; and the question is, whether such mortgage was invalid by reason of the facts that the mortgaged premises were the homestead of Manners and his wife, and that his wife did not join in the mortgage. The mortgage was executed April 22, 1875, and on its face purported to be a mortgage of personal property, to wit, of a one and one-half-story frame house situated on the lot hereinafter named. The District Court found in favor of the defendants in error, and while rendering a personal judgment against G. A. Manners for the note, refused to decree a foreclosure of the mortgage.

The following facts were admitted by the parties on the trial, or were introduced in evidence: In 1873, G. A. Manners leased lot 24, in block 47, in the town (now city) of Garnett, of William Hamilton, for the purpose of erecting a frame building thereon.

The lease was for a term of two years, with the privilege of holding and using the lot for a longer time ; provided, however, that G. A. Manners was to give possession of the lot whenever William Hamilton should sell it, or want to build upon it himself. In either case, G. A. Manners had the right to remove the building he should erect on the lot. G. A. Manners has continued to occupy the lot with his building from year to year. He used the north part of the ground floor for a butcher shop ; his wife, the south part of the ground floor for a milliner shop. The upper story, and a part of the south room down stairs, were occupied by the family for a residence.

The testimony does not disclose at what time in 1873 the lease was made, nor whether the mortgage was executed before the expiration of the term of two years named in it. Perhaps this is not very material, for the lease provided for a holding after that term, and probably at the same rental, two dollars a month.

The question arising on these facts is, whether a leasehold estate will support the homestead right. It has already been decided that one who has only an equitable interest in land may have a homestead right therein. *Tarrant v. Swan*, 15 Kans. 146 ; *Moore v. Reeves*, id. 150. In the first of these cases, the homestead claimant owned an undivided one-half of the property, and in the other he had but a simple contract of purchase. The constitutional as well as statutory provision is, "A homestead, to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner." The question hinges on the force to be given to the words "land" and "owner." On the one hand, it is claimed that these words imply a title either legal or equitable to the soil itself, as distinguished from a mere right of temporary possession. On the other, that the word "land" is given by statute a meaning which includes a mere leasehold interest, and that the owner of such an interest is therefore an owner of the land within the Constitution. "The term 'land' at common law has a twofold meaning. In its more general sense it is held to comprehend any ground, soil, or earth whatsoever, as meadows, pastures, woods, marshes, furze, etc. In its more limited sense, the term 'land' denotes the quantity and character of the interest which the tenant may own in lands. 'The land is one thing,' says Plowden, 'and the estate in the land is another thing, for an estate in the land is a

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time in the land, or land for a time.' When used to describe the quantity of the estate, 'land' is understood to denote a freehold estate at the least." Per SMITH, C. J., in *Johnson v. Richardson*, 33 Miss. 462. Now in what sense would one naturally understand that the word was used here? Obviously it seems to us in its general sense, as descriptive of that which is exempt, rather than of the title by which it is held. When in ordinary discourse we speak of a tract of land, we have in thought the land, and not the ownership of it. Here the qualifying words make this more plain; it is land to the extent of one hundred and sixty acres. These words measure area, but do not qualify title; but we need not rest upon this general consideration. The statute defines the meaning of the word. It "includes lands, tenements and hereditaments, and all rights thereto and interest therein, equitable as well as legal." Comp. Laws 1779, 919, § 1, ¶ 8. And this was the statutory definition prior to the adoption of the Constitution, and has been continued in force ever since (Laws 1859, 614, § 1, ¶ 8; Laws 1862, 838, § 1, ¶ 8; Laws 1868, 999, § 1, ¶ 8); and whether the framers of the Constitution used it in that sense, or not, is immaterial, for the homestead is granted by statute as well as by the Constitution, and the same legislatures that defined the word "land" enacted the homestead statute. Now a leasehold estate is an interest in land. "An estate for years is denominated a chattel real; being an interest in land, it has the quality of immobility, which constitutes it real." 1 Hill on Real Prop., 179, § 23. A leasehold estate in land is therefore "land," within the statutory definition of the term, and an owner of the leasehold estate is an owner of land; and it matters not whether the duration of this estate be ninety-nine years, or but a single year; the character of the title or estate is the same. The owner of a leasehold estate is therefore within the letter of the homestead law; he is also within the spirit. Its purpose is not so much to give a man property as to secure his family a home. And if the home be secured, what matters it whether that home be temporary or permanent, or by what tenure or title it is held? Indeed, is not the wisdom of the statute more apparent when he who is unable to purchase a permanent, is enabled to secure to his family a temporary home; and its justice equally clear when he who is able to purchase such permanent home invests but a portion of his means in a temporary one, keeping the balance within reach of his creditors?

It will be noticed that exemption from liability for indebtedness, and inalienability without joint consent, go hand in hand in the matter of a homestead. That which secures the one, guarantees the other. They coexist, or they do not exist at all. While the authorities are not uniform, yet we think the general drift of the decisions is in harmony with these views. In *Sears v. Hanks*, 14 Ohio St. 301, the court, speaking of the homestead law, says: "We think its provisions protect the debtor's family as against his creditor to the enjoyment of an actual homestead, irrespective of the title or tenure by which it is held." In *Spencer v. Geissman*, 37 Cal. 99, it was held that one having a mere naked possession, the title being in a stranger, may acquire a homestead right as against everybody but the true owner. See, further, on the general principle: *Deere v. Chapman*, 25 Ill. 612; *Bartholomew v. West*, 2 Dill. 293; *McKee v. Wilcox*, 11 Mich. 358; *Thorn v. Thorn*, 14 Iowa, 49. And the very question in this case has been answered in at least three States. *Phelan v. De Brevard*, 13 Iowa, 53; *Conklin v. Foster*, 57 Ill. 104; *Johnson v. Richardson*, 33 Miss. 462. We think, therefore, that an affirmative answer is sustained by authority, and is within both the letter and the spirit of the homestead law. The ruling of the District Court upon this was therefore correct.

But, say counsel for plaintiff in error, the mortgage was not upon the leasehold estate, the term in the land, but upon the building; that Manners listed and paid taxes on this as personal property; that he had the right to remove the building; that it was therefore personal property, and as such Manners mortgaged it. To this, it is a sufficient reply that it was so listed and taxed by virtue of express statutory provision. Comp. Laws 1879, 522, § 31. That it was built upon the land, and that not only the land — by whatever title it is held — is exempt and inalienable without joint consent, but also "all the improvements on the same." Whatever might be the case after the building was in fact removed, the homestead right remains until such removal.

Another proposition of counsel is, that this was not a homestead, because partly used for business purposes. Upon the evidence as it is preserved, we cannot say that the court erred in holding this a homestead. The size of the building, further than that it was a one and one-half-story house, is not shown. Whether chiefly used for business or residence purposes, does not clearly appear. The fact that a party may have his store, or shop, or office in a part of his

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residence, will not of itself destroy its homestead character. We are not called upon to decide whether the occupation by the family of the owner of a single room in a large building used chiefly for stores and offices, will give to the entire building a homestead character. All we do decide is, that where a building, whose size and number of rooms is not shown, is occupied as a residence by the family of the owner, its homestead character is not destroyed by proof that a single room or two is used by the owner for business purposes. *In re Tertelling*, 2 Dill. 341; *Orr v. Shafer*, 22 Mich. 260; *Lazell v. Lazell*, 8 Allen, 575; *Mercier v. Chase*, 11 id. 194; *Goldman v. Clark*, 1 Nev. 607; *Ackley v. Chamberlain*, 16 Cal. 181; *Kelley v. Baker*, 10 Minn. 154; *Phelps v. Rooney*, 9 Wis. 70.

The effect of the temporary abandonment of the homestead is disposed of by the decision of this court in *Hixon v. George*, 18 Kans. 253.

There being no other question in the case, the judgment will be affirmed.

Judgment affirmed.

All the justices concurring.

 CENTRAL BRANCH UNION PACIFIC RAILROAD CO. v. TWINE.

(23 Kans. 585.)

Damages — measure of, for occupancy of street by railway, to lot-owner.

Although a railroad company is licensed to occupy a street or alley with its track, yet if in so doing it changes the grades, or otherwise obstructs access to lots by its tracks, or by leaving cars unnecessarily standing on the track, the lot-owner may maintain an action for damages, and the measure of damages where the obstruction is fluctuating, as by leaving cars on the track, is the injury prior to the commencement of the suit, but where the injury is permanent, as by the change of grade or the manner of laying the track, the lot-owner may recover the consequent depreciation in the value of his lot; and in such cases a recovery implies a conclusive consent to such occupation.

ACTION to recover damages for obstructing access to a lot. The facts are stated in the opinion. The plaintiff had judgment below.

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D. Martin and Everest & Waggener, for plaintiff in error. 'The plaintiff could not recover any damage not sustained when his action was commenced. 23 N. H. 101; 14 id. 303. In *Cumberland & Oxford Canal Co. v. Hitchings*, 65 Me., it is held that "the loss sustained at the date of the plaintiff's suit, and for which a recovery has not already been had," is the measure of damage, and not the diminution in the value of the estate. 17 Am. Law Reg. 597; 1 Den. 257; 1 Zab. 469. In *Bathishill v. Reed*, 37 E. L. & E. 317, it was held, in an action similar to the one at bar, that "evidence tendered for the purpose of showing a diminution of the salable value of the premises was inadmissible." 50 Cal. 194; 10 Penn. St. 93. In *Pinney v. Beny*, 61 Mo. 360, it was held that "plaintiff's measure of damage is the loss actually sustained up to the commencement of the suit." 17 Mass. 289; Hill. on Torts, 573, § 16; id. 602, § 11; 15 Mo. 153; 6 id. 228; 17 Ohio, 489; 7 Metc. 283; 19 Pick. 147; 7 Q. B. 339, 377.

If the railroad company had no right to place the track in the alley, then it was guilty of maintaining a nuisance; and a judgment for injuries sustained at the commencement of the suit would not be a bar to injuries sustained since the commencement thereof. It would follow, therefore, that the diminution of the value of the abutting property could not be made the measure of recovery.

Hudson & Tufts, and *Greenlee & Jackson*, for defendant in error.

BREWER, J. The defendant in error brought an action in the District Court of Atchison county, against the Central Branch Union Pacific Railroad Company, alleging in substance that he was the owner of a certain lot in the city of Atchison, occupied by the said Wm. M. Twine as a residence; and that on the south line of said lot there was an alley set apart and dedicated to the use of the public, and for the use and benefit of adjoining lot-owners; that said alley was the only way by which the said Wm. M. Twine could have ingress to and egress from the south end of said lot; that on or about the 1st day of August, 1877, the railroad company "illegally and wrongfully obstructed the alley aforesaid by digging ditches therein, and laying down and building its railroad track therein, and that since the 1st of August, 1877, it has kept its railway cars and coaches continually and at all times standing upon its said track in said alley, and that it has kept the said ditches and its said track so dug

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in such condition as to illegally, wrongfully and improperly obstruct said alley during all of said time, and that it has illegally, wrongfully and improperly deprived this plaintiff of all use and benefit of said alley, and of all means of ingress to and egress from the south of said lot in any other manner than by passing through his dwelling-house, since about the 1st day of August, 1877; that by reason of such acts of the railroad company, the said Twine had been damaged in the sum of five hundred dollars." To this petition the defendant company filed a general denial. The case was tried at the Juneterm, 1878, without a jury, before Hon. ROBERT CROZIER judge *pro tem.*, and judgment rendered against the railroad company for the sum of one hundred and twenty dollars. A motion for a new trial was duly filed by the railroad company, and being overruled, the plaintiff in error brings the case to this court, seeking to obtain a reversal of the judgment of the court below.

We see no error in this ruling. The petition alleges the ownership of the lot, that it abutted on this alley, which of course gave a right of ingress thereto and egress therefrom, and which right, personal and of special value to the plaintiff, the railroad company had destroyed by its manner of occupying the alley. It charges substantially that the railroad company has destroyed the use of this alley as a public highway and has appropriated the same to its own use, and that the plaintiff as the owner of an abutting lot is specially injured, in that ingress to and egress from his lot over this established highway are destroyed. That this wrong gives a right of action is plainly affirmed in the case of *A. & N. R. R. Co. v. Garside*, 10 Kans. 552. See also *Venard v. Cross*, 8 id. 248.

While a railroad company may use a highway, it cannot confiscate it; at least, a mere license to occupy does not give a right to destroy it. So long as it is a highway, the public use cannot be destroyed. And whenever a railroad company occupying a highway so lowers, or fills or cuts it up as to prevent its use as a highway, the public may interfere and prevent such manner of occupation. And any individual sustaining special injury from such occupation may recover his damages therefor. A railroad company has no higher rights in a highway than an individual—it may share in its use, but cannot monopolize it; and the owner of a lot abutting on the highway, and who has special need thereof for ingress to and egress from his lot, is specially damaged by any monopolizing of the use of the highway by a railroad company.

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Here, the appropriation charged is in the manner of construction, and in leaving its cars constantly standing upon the track. Either is a wrong, giving plaintiff a cause of action. *Haynes v. Thomas*, 7 Ind. 38; *Elizabeth, etc., R. R. Co. v. Combs*, 10 Bush, 382; s. c., 19 Am. Rep. 67; *J. M. & I. R. R. Co. v. Esterle*, 13 Bush, 667; *Sletson v. C., etc., R. R. Co.*, 75 Ill. 74; *Street Ry. v. Cummins-ville*, 14 Ohio St. 523.

The other and more important question worthy of notice is the measure of damages. The court found that, from the manner in which the railroad track was constructed, and left to remain, the plaintiff was damaged in the sum of \$120. Upon what method of computation this result was reached, the findings do not advise. From them alone it could not be said whether this was simply the damages suffered by the owner from the continuance of the nuisance up to the day of filing the petition, or the depreciation in value of the property by reason of the track being regarded as a permanent obstruction of the highway. Neither are there given in the testimony any sums or figures from which, as in the computation of an account, these exact damages could be reached. There being, then, no certainty from the findings whether the damages were for loss of rent, or other temporary injury, or for permanent depreciation in value, and one or the other being unquestionably correct, the contention of counsel for defendant in error is, that the presumption must be that the trial court adopted the proper method of computation, the correct measure of damages. On the other hand, counsel for the plaintiff in error claim that the rulings on the trial show that the court treated the wrong as a permanent injury, and measured the damages by the depreciation in value of the property. In support of this, they cite the admission of testimony over objection as to the value of the premises before and after the laying of the track, and the sustaining of an objection to a question as to the damage to the property from the laying of the track to the date of the commencement of the suit. In regard to this latter ruling, it can be sustained upon other grounds. Such a question, *i. e.*, as to the amount of damage done or caused by a particular act, is generally objectionable. That is not a matter calling for the opinion of a witness. *Roberts v. Comm'rs Brown Co.*, 21 Kans. 247.

We may remark generally as to the testimony, that it was very full and specific as to the condition of the alley prior to and after the laying of the track, the relations of the alley to the plaintiff's

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premises, the manner and frequency of its use by him, and all other circumstances from which injury, whether temporary or permanent, could be deduced. And even if the inquiry were limited to the mere temporary damages, we are not entirely clear that evidence of value was incompetent; though see *Bathishill v. Reed*, 37 Eng. L. & E. 317; *Hopkinson v. W. P. R. R. Co.*, 50 Cal. 194; *Pinney v. Beny*, 61 Mo. 360; *D. & B. Canal Co. v. Wright*, 1 Zab. 469; *Hatfield v. R. R. Co.*, 33 N. J. 251.

But conceding that the court treated the obstruction as a permanent one, and measured the damages accordingly as for a permanent depreciation in the value of the property — and we are inclined to think such was the view actually taken — was the ruling erroneous? It will be noticed that the petition counted on obstruction in two ways: First, by the track itself; and second, by permitting cars to remain an unnecessary and unreasonable length of time on the track. The finding ignores this latter cause of inquiry, and awards the damage solely in consequence of the former. Now the latter injury is obviously and in its nature temporary. It constitutes a nuisance to-day which to-morrow may cease. At any rate, it is fluctuating, and depends on the daily action of the company. It is not a nuisance which in any sense can be regarded as permanent. For such injuries, it may well be that only such damages as have been sustained by the conduct of the company prior to the suit are recoverable. There can be no presumption that the company will continue the wrong. So if the injury charged was in the digging up the alley for the purpose of laying the track, such an obstruction as continues only during the process of construction, and which ceases when the track is completed — that is but a temporary wrong. But here the wrong charged is, that the track, as it stands after completion, so occupies the alley as to exclude other use, and prevent ingress and egress; and the testimony abundantly shows that the company considers such manner of occupation necessary for its purposes, and has so laid the track with reference to its own necessities. Having reference to its own uses and purposes, there was no negligence in the construction; the work was well and properly done. The wrong consists in this, that if its use of the alley continues, the plaintiff's use must cease. Now is it not to be presumed that when the company thus laid its track it intended a permanent use of the alley, a permanent dispossession of plaintiff from its use? — and may not the plaintiff,

accepting that as a fact, recover in a single action the permanent injuries which his property sustains thereby? Must he assume that because the company can, it will remove its track, and so for each day's continuance of the obstruction bring his separate action? Must he assume that because the State can, it will compel such a modification, or if necessary, abandonment of the use by the railroad company as will permit a use by the public generally, and thus treat that as temporary which the company evidently intends as permanent, and which he as an individual cannot prevent from being permanent? It may well be that the State regards the use by the company as of more value to the public than the general use by the public itself, and so will never interfere with such use by the company. And if the State assents, who can disturb the use? For while there are cases in which an individual can abate a public nuisance, when that nuisance does him a special and personal injury, can that be called a public nuisance which the State authorizes, or even that which it simply assents to? Suppose the State in express terms empowered a railroad company to construct its track along a highway, at such a grade as to destroy its use by the public generally as a highway: Is not such authority within the power of the State? And would it be contended that under pretense of abating a public nuisance of special injury to himself, an adjacent lot-owner could remove the track or restore the grade? It is said by Cooley, in his work on Torts, p. 615: "The State having in some form provided for and created a certain easement, may at its will abandon it, or change it to some other easement, or restrict or enlarge the use of it, and generally do with the creature of its authority what it pleases. A common highway may thus be qualified by the laying of a railway track upon it; a navigable stream may be bridged or dammed; awnings may be permitted above a city street, and covered areas below it; navigation companies may be given special privileges in the public streams of the State, and so on. In these cases the State only restricts or narrows its own right; and the right of the individual, which is only a part of the public right, can be no broader than that which the State has retained."

If this be true, when the State expressly grants such authority, is it not also true when the State merely licenses the occupation by the railroad company, and the latter in a reasonable and proper construction of its track so changes the grade as to practically ex-

Central Branch Union Pacific Railroad Co. v. Twine.

clude all other use of the highway, and such change of grade and manner of occupation is unchallenged by the State? Is not, so far as the individual is concerned, this implied assent equivalent to express authority? and can he, either by his own act or through any process of the courts, abate this obstruction of the highway? But be this as it may, may not the lot-owner, when such appropriation of a highway is in fact made by a railroad company, at least assume that the State has granted authority, and that the company has done that which it had license to do, and treat the appropriation as permanent? And in such case, may he not recover for the obstruction to ingress and egress as a permanent injury to and depreciation of the value of his lot?

While the amount in controversy here is small, the principle is important. A net-work of railroads already covers the State, and the iron track is being pushed in every direction it will soon touch every city and town and village, and in the nature of things must occupy many highways and streets. Frequently, conformity to the established grade of the highway may be impossible. Sometimes there may be express grant of authority to alter the grade to the extent of partially or totally obstructing other travel; more often, as in the present general law, simply license to occupy, with the duty of restoring the road to such a state as not to impair its usefulness as a highway. Comp. Laws 1879, p. 224, § 47. Of course, the controlling and supervising power of the State always remains. But where, occupying under the general law, a railroad company so change the grade as to obstruct ingress and egress, must the lot-owner treat it as simply a continuing nuisance, for each day's continuance of which he has a separate action, and so multiply suits with no benefit to himself and great injury to the company, or may he not treat it as a permanent injury, recover for its effect upon the value of the lot as such an injury, and thereby yield his personal assent to the continuance of such obstruction, and estop him or any subsequent owner of the lot from challenging the company's manner of constructing its track? When the right of way is condemned, though only an easement is taken, the full value of the land is awarded because the appropriation is understood to be permanent. The company may abandon its right of way to-morrow, yet action is taken as though it never would abandon. So when its track is laid in a highway, unless placed in such a manner as indicates only a temporary use, may it not be treated

as a permanent appropriation, and action taken accordingly? Does not the spirit of the present law aim to adjust rights with fewest suits and least litigation? and will it not tend to the interest of the railroad company and the lot-owner alike, to have all questions adjusted in a single action, instead of by repeated suits for continuing wrongs? Again, is not the obstruction of ingress and egress an appropriation of private property for which compensation is to be made, and does it lie in the mouth of the company to say that it had no right to appropriate it and may be compelled by the State to restore it?

In *Haynes v. Thomas*, 7 Ind. 38, it is said: "The right to use a street in a town adjoining a lot abutting on it is as much property as the lot itself, and the legislature has as little power to take away one as the other. Whether the act of dedication transfers the fee from the donor to the public is not a material inquiry." In *Elizabeth, etc., R. R. Co. v. Combs*, 10 Bush, 382; s. c., 19 Am. Rep. 67, the court says: "It is well settled, both here and elsewhere, that the owners of lots have a peculiar interest in the adjacent street, which neither the local nor general public can pretend to claim — a private right in the nature of an incorporeal hereditament, legally attached to their contiguous ground — an incidental title to certain facilities and franchises assured to them by contract and by law, and which are as inviolable as the property in the lots themselves." And in *Cooley on Torts*, p. 616, following the quotation made *supra*, the author says: "But while the State may restrict its own right, it cannot restrict or take away the rights which are purely individual, even though they are intimately associated with the public right. An example has been given in another place of a railroad laid down in a public highway by State consent, and it was stated that this consent would not empower the railroad company to cut off an adjacent land-owner from convenient access to the street. This right of access is an individual, not a public, right, and the land-owner, in claiming damages for being deprived of it, is complaining not of a public, but of a private, nuisance." And in the case of *J. M. & I. R. R. Co. v. Esterle*, 13 Bush, 667, it was decided, that where access to a lot was obstructed by the laying down of a railroad track, a single action might be maintained for the depreciation in value, and the bringing of such an action was an assent to the continuance of the obstruction; in other words, it was treated as a permanent appropriation of private property for which full com-

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pensation was to be made. See also *L., etc. R. R. v. Applegate*, 8 Dana, 294; *LeClercq v. Gallipolis*, 7 Ohio, 217; *Cincinnati v. White*, 6 Pet. 431; *Mix v. L. B. & M. Ry. Co.*, 67 Ill. 319; *Stone v. F. P. & N. W. R. R. Co.*, 68 id. 394.

Without pursuing this argument further, we conclude that where the injury springs from the manner in which the track as completed affects access to the lot, the lot-owner may treat it as a personal injury to the lot, a *quasi* condemnation of a certain interest in his property, and recover the consequent depreciation in value, and that such recovery is an assent on his part to such manner of using the highway by the company, and concludes both him and all subsequent owners of the lot.

There being no other question of importance, the judgment will be affirmed.

Judgment affirmed.

All the justices concurring.

PIAZZEK V. WHITE.

(23 Kans. 621.)

Replevin — for share of mass of grain.

Where several own cereal grain, of the same kind and value, mingled together by their consent or by reason of circumstances reasonably to be foreseen, each may maintain replevin for his just proportion.

REPLEVIN. The opinion states the facts. The defendant had judgment below.

J. Safford and *D. P. & H. C. Safford* for plaintiff in error. Will the mixture of grain, by consent of the owners thereof, take away the right of an owner to recover possession of his portion of the mixture by an action of replevin? The ownership of each portion is not changed by such mixture; for "where articles of the same kind and value, which are calculated by the bushel or pound, are mingled together by the consent of parties, each party is entitled to have divided to him as many pounds or bushels as he may have put in, and is recognized in law to have a property in so much as he

may have put into the common stock." *Inglebright v. Hammond*, 19 Ohio, 344. "The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership." 21 Pick. 298, 306. "Where grain belonging to different owners has been stored in mass with their consent, each may, if necessary for the maintenance of his rights, maintain replevin for his share, subject to deduction of his proportion of loss or waste occurring to it while so in mass." *Young v. Miles*, 20 Wis. 646. See also *Morris on Replevin*, 101; 21 Wis. 417; 29 id. 531; 33 id. 141; 9 Mass. 427; 21 Pick. 305; 58 Mo. 218; 19 N. Y. 330; 21 Penn. St. 359.

A. H. Case and *M. T. Campbell*, for defendant in error. By the contract between the plaintiff and defendant, the corn passed to the defendant, and was thenceforth his, and at his risk. It was not a *depositum*, but it was what is known as an "irregular bailment," and when the defendant refused to deliver, it became a money demand, and plaintiff was remitted to his action for its value. 1 Ohio St. 244; *Edw. on Bail*. 137, 186, 204.

If the property was mixed with defendant's goods at the request of plaintiff, so that it could not be identified, he must fail in this action. 2 Bl. Com. 405; 14 Cal. 410; 27 id. 464; 11 Cush. 573; 4 Greene, 23; 12 Conn. 331; 1 Har. & G. 308. The parties also became tenants in common. 1 Hill. on Torts, 477, 478; 1 Ohio St. 251. Being tenants in common, the corn should not be replevied. *Morris on Replevin*, 113; 15 Pick. 71; 12 id. 324; Co. Litt. 199, 196; 7 Dana, 283.

HORTON, C. J. Replevin for 300 bushels of corn, of the value of \$81, commenced by Piazzek against White, before a justice of the peace. The action was taken on appeal to the District Court, where it was tried at the May term, 1879. Judgment was given for defendant White. The plaintiff brings the case here on error.

On the 30th day of January, 1877, plaintiff rented certain land to defendant for the term of three years from March 1, 1877, (except in case of a sale of the premises, when the lease was to terminate), the defendant agreeing to cultivate all the plow-land on the premises, and to put the same into corn. Plaintiff was to have one-third of all the corn raised, to be delivered to him on the place in cribs to be furnished by him. For the season of 1877 the plaintiff's share was about 2,500 bushels. During December, 1877

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defendant filled plaintiff's cribs with 2,200 bushels, which was all they would hold. The balance of plaintiff's share, 300 bushels, is the subject of this controversy.

Counsel complain that the charge of the court was erroneous, and the verdict not supported by the testimony. The principal objections to the charge are, that it had no applicability to the facts proved or issues involved in the trial, and that the direction, "that if the defendant had the option to deliver on demand the same corn, or corn of like quality, the plaintiff could not recover," was erroneous. To a complete understanding and elucidation of the case, we must refer to the testimony. On the part of the plaintiff it was shown that the crop was divided into loads; that defendant's share thus set apart was two-thirds and plaintiff's one-third; that plaintiff's share was placed in his own cribs, except 300 bushels, which could not be put into them for lack of room; that this 300 bushels was placed in defendant's cribs. The defendant testified that 300 bushels of the corn belonging to plaintiff could not be stored in plaintiff's cribs, for the reason that they were full; that he made an agreement with Ellinwood, the agent of plaintiff, that the 300 bushels should be stored in his crib, and that the same amount or quantity of corn of like quality should be measured out by him, less shrinkage, whenever plaintiff should desire him to deliver the corn; that under this agreement he stored in his crib as much as 300 bushels of corn belonging to plaintiff.

Upon this testimony, we are of the opinion that the portion of the charge of the court concerning the deposit or storage of the corn with the defendant, without any limitation or qualification, was erroneous and misleading, and that the verdict of the jury cannot be sustained. The current authorities fully support the doctrine very clearly stated by DIXON, C. J., in *Young v. Miles*, 20 Wis. 646. It is in substance, that as to articles like wheat and the cereal grains, and the flour manufactured from them, wine, oil and fruits of the earth which are sold, not by a description which refers to and distinguishes the particular thing, but in quantities which are ascertained by weight, measure or count, and which are undistinguishable from each other by any physical difference in size, shape, texture or quality, there may be different owners of a common mass, each having a separate property in his share, and each entitled to sever it from the share or shares of the others, and if necessary for the preservation of his rights, to maintain replevin

for the same, subject to deductions for any loss or waste properly falling to his share while the property remained in mass. *Kimberly v. Patchin*, 19 N. Y. 330; *Kaufmann v. Schilling*, 58 Mo. 218; Wells on Replevin, §§ 203, 209. The agreement of the parties, as stated by defendant, was clearly, in the opinion of the writer, to the effect that the plaintiff continued to be the owner of the same number of bushels of corn, less shrinkage, stored with defendant's corn, in the latter's crib, to be taken from the mass after the mixture, or in the words of the defendant, "to be measured out" (of the mass in the crib) "by defendant, less shrinkage, when a demand was made by plaintiff;" that it was not the intention of the parties that defendant should use, sell or otherwise dispose of all of the corn in the crib, with the option on his part to return the same amount or quantity of corn of like quality from some purchase of corn, or from other corn than that in the crib; that the parties always expected enough of the mass to be in the crib to satisfy plaintiff. An ample amount was on hand in the crib when this action was commenced. The court below, and the jury, following the instructions, treated the storing of the corn with defendant as though the absolute property passed to the defendant, and as if delivered to him for consumption or appropriation for his own use. Taking all the circumstances together, and the statements of defendant, it seems to us that it was the intention of the parties that the property should remain in the plaintiff, and that the transaction was a bailment. That the defendant, now making an adverse claim, so regarded the transaction, is manifest from his statement to the witness Bullock, a few days before the commencement of this action, "that he had 300 bushels of corn belonging to plaintiff in his crib, and that he would turn it over to Kellam, as agent of plaintiff, for transportation to Valley Falls;" and his other statement, made subsequently, "that he was going to sell plaintiff's corn to get even with him." The charge of the court should have directed the jury that if the corn of plaintiff was stored along with the defendant's corn, in the latter's crib, under an agreement that the defendant should measure out of the mass in the crib the same amount or quantity of corn, of like quality as that deposited, less shrinkage, whenever plaintiff should desire the defendant to deliver plaintiff's corn, then the jury should find for the plaintiff. Of course, we do not wish to be understood as saying, that if it was the intention of the parties that the 300 bushels of corn were turned over to the defendant as

State v. Lantz.

a loan for consumption, to be restored from other and different corn than that in the crib, the property of the corn remained in the plaintiff, or that he should recover. It is simply because, as we construe the agreement, the defendant was to store the corn for plaintiff, and to measure back to him from the mass in the crib the amount to which he was entitled, that we think the jury may have been misled.

The judgment of the District Court will be reversed, and the case remanded for a new trial in accordance with the views herein expressed.

Judgment reversed.

All the justices concurring.

STATE V. LANTZ.

(28 Kans. 728.)

Criminal law—trial—jury consulting atlas.

Where an officer in charge of a jury, in a case of burglary, by their request but without authority of the court, furnishes them with an atlas, which they examine in their deliberations, their verdict of conviction is void, it not affirmatively appearing that no improper influence was thus produced on the jury.*

CONVICTION of burglary. The opinion states the facts.

W. H. Browne, for appellant.

W. T. Johnston, county attorney, for the State.

HORTON, C. J. After the jury had retired to consider their verdict, the bailiff went to the jury room in response to a knock upon the door, and by the request of a juror passed into the jury room a Miami county atlas. During the deliberations of the jury, the atlas or map was spread out before the jurors and examined by them. The officer had no right to furnish the atlas to the jurors, and the

* The same was held in *Bouldin v. State*, 8 Tex. Ct. App. 832, a murder case, as to rifle and bullets, referred to in the testimony.—REP.

jurors had no right to examine it while deliberating upon their verdict. It was evidence, or at least a document or papers, not authorized by the court. The act of the officer was irregular, and the reception of the map by the jurors illegal.

Counsel for the State insists that there is no showing made that the atlas produced any improper influence on the jury. The burden of proving that the rights of the defendant were not prejudiced rests in a case like this upon the prosecution. Here the State failed. Several affidavits were presented to establish the fact that the bailiff was not present with the jurors during their deliberations, but no denial was made, or any explanation given of the examination of the atlas in the jury room. In the case of *State v. Taylor*, 20 Kans. 643, we held the paper taken to the jury room by mistake not detrimental to the rights of appellant. The paper was preserved in the record, and it affirmatively appeared, from an examination, that no injury resulted to the defendant. We cannot say this of the atlas. It may have been examined to determine the situation of the dwelling-house charged to have been burglariously entered, or it may have been consulted as testimony on other matters. Clearly, we cannot affirm that the defendant was not prejudiced. § 275, Criminal Code, Comp. Laws 1879, p. 763; *State v. Mulkins*, 18 Kans. 16; *State v. Snyder*, 20 id. 306. In this connection, we deem it necessary to correct the opinion as reported in *State v. Taylor, supra*. "Liberally," on page 646, is an interpolation of the printer. "Reasonably" is the word in the opinion.

The refusal to grant a new trial was error. It is therefore ordered that the verdict of the jury and the judgment of the court be set aside, and the case remanded for a new trial.

It is further directed that the defendant be returned from the State penitentiary and delivered over to the jailer of Miami county, there to abide the order of the District Court of said county.

All the justices concurring.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

**STATE EX REL SOARES V. HEBREW CONGREGATION "DISPERSED OF
JUDAH."**

(30 La. Ann. 205.)

Religious society — mandamus to compel restoration to membership.

A mandamus will not lie to compel a religious society to restore to membership one who had been expelled by a decree of the legally constituted church judicatory, on account of an alleged violation of some law of the society ; and the ground that such restoration is necessary to enable him to enjoy the right of sepulture acquired by him as a member, is premature.

A PPLICATION for mandamus. The opinion states the case.
The writ was refused below.

H. H. Walsh, for appellant.

Kelly & Lazarus, for appellees.

MANNING, C. J. The relator is an Israelite, and was a member of the Congregation of the Dispersed of Judah, a corporation organized and chartered under the laws of this State. On June 13, 1877, he was expelled therefrom, he alleges illegally and arbitrarily, and now prays that a writ of mandamus be directed to the officers of

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the corporation, compelling them to restore him to his rights and privileges of membership.

The answer admits the membership of the relator prior to the date mentioned, and avers that on that day, at a meeting of the Congregation, there being present a legal quorum thereof, certain charges were preferred against him of gross misconduct, upon which testimony was received, and of which he was found guilty, and was thereupon expelled by a vote of three-fourths of the members present, which mode of proceeding, it is averred, is in accordance with the constitution and laws of the Congregation. The respondent then pleads to the jurisdiction of the court, averring that such expulsion is wholly within the cognizance of the ecclesiastical tribunal, provided by the corporation of which he was a member, and that the civil courts have no authority to inquire into, or revise the same.

The correctness of this return to the alternative writ is verified by the oath of the president of the Congregation, and was not traversed by the relator, nor was any proof offered to impugn its truth. The case thereof presents the naked question, whether the civil courts can or will revise the ordinary acts of church discipline, or the administration of church government.

The entire separation of Church and State is not the least of the evidences of the wisdom and forethought of those who made our National Constitution. It was more than a happy thought—it was an inspiration. But although the State has renounced all authority to control the internal management of any church, and refuses to prescribe any form of church government, it is nevertheless true that the law recognizes the existence of churches, and protects and assures their right to exist, and to possess and enjoy their powers and privileges. Of course wherever rights of property are invaded, the law must interpose equally in those instances where the dispute is as to church property as in those where it is not, and it also takes note of, but does not itself enforce, the discipline of the church, and the maintenance of church order and internal regulation. The law does not assume, and will not declare, that a particular religious association is more truly the church than another, but each and all of them are permitted to make their own regulations, and to enforce them in the manner each has provided for itself.

This whole subject was maturely considered and elaborately ex-

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pounded in *Watson v. Jones*, 13 Wall. 679, where the court say : "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general associations, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." P. 728.

The court refer in that opinion to *Harmon v. Dreher*, 2 Speer's Eq. 87 (S. C.), as one of the most careful and well-considered judgments upon the subject, in which it is said : "It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether, if held, were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the Synod or to his denomination. * * * When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them."

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So too in Missouri, in *State ex rel. Watson v. Farris*, it was said the utter impolicy of the civil courts attempting to interfere in determining matters which have been passed upon in church tribunals, arising out of ecclesiastical concerns, is apparent. It would involve them in difficulties and contentions and impose upon them duties which are not in harmony with their proper functions. Before a court could give an enlightened judgment, it would be necessary to explore the whole range of the doctrine and discipline of the given church and survey the vast field of the divine word.

And in Kentucky the binding force and completeness of the church's action is thus stated: "Every person entering into the church, impliedly at least, if not expressly, covenants to conform to the rules of the church, to submit to its authority and discipline. Appellant when he became a member thereof placed himself in this condition. * * * Whether in what the church did it acted right or wrong, this court cannot approach its precincts to inquire, and is powerless to redress any wrong inflicted on appellant thereby. By becoming a member of the church he subjected himself to its ecclesiastical power, and neither this nor any other earthly tribunal can supervise or control that jurisdiction." *Lucas v. Case*, 9 Bush. 297.

And finally the rule is enunciated by an approved modern writer thus: "The principle may now be regarded as too well established to admit of controversy, that in the case of a religious congregation or an ecclesiastical body, which is itself but a subordinate member of some general church organization, having a supreme ecclesiastical judicatory over the entire membership of the organization, the civil tribunals must accept the decisions of such church judicatory as final and conclusive upon all questions of faith, discipline, or ecclesiastical rule, and the party aggrieved cannot invoke the aid of the civil courts to have such proceedings reversed." *High on Injunctions*, § 233.

One of the allegations of the petition is that by the expulsion of the relator from the congregation, the right to be buried in its burying-ground will be, or is denied him, and the celebrated case of *Guibord* is cited as an instance where the civil courts took cognizance of the refusal of sepulture by the ecclesiastical authorities, and enforced the party's right to burial in consecrated ground. The final decision of that case was by the judicial committee of the Privy Councils in England, and courts there go much further than

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they would do here in enforcing rights appertaining to, or growing out of, ecclesiastical matters. But it is sufficient to say, in disposing of this part of the complaint, that Guibord was dead, and the object of the proceeding in his case was to procure the interment of his body in that part of the Montreal cemetery which was consecrated, whereas the relator has happily no present need of enforcing his claim to burial anywhere, and *non constat* that before he does need it, he will have his ban of excommunication removed, and be restored to full fellowship in the congregation.

It sufficiently appears from what has now been said that we think the relator's demand cannot be enforced by the civil courts. The return or answer to the alternative writ set up as grounds why the peremptory writ should not issue, that the relator had been excommunicated according to the rules adopted and in force in the congregation from which he was expelled, and the by-laws in evidence show what these rules were. The judicatory provided by those laws has acted upon the matter, and we cannot go behind its action to inquire whether it acted rightly or wrongfully, justly or unjustly. It is the tribunal to which he submitted himself when he accepted membership of the congregation, and its action is not examinable in a civil court.

It will be observed that we assume, as we are obliged to do in the state of the pleadings and evidence in this case, that the church judicatory was properly constituted, and in the manner prescribed by the constitution and by-laws of the congregation. The returns not having been traversed by proof, nor excepted to for insufficiency, is taken as true for the purpose of testing the right to the peremptory mandamus, and that return avers and exhibits the constitution of the body which forms the judicatory, and which passed the sentence of excommunication. *State ex rel. Vierra v. Lusitanian Society*, 15 La. Ann. 73; *Tucker v. The Justices*, 1 Jones, 451; *People v. Finqu*, 24 Barb. 341.

The judgment of the lower court sustained the exception to the jurisdiction, and refused the peremptory mandamus. It is correct and is affirmed.

Judgment affirmed.

HARVEY V. NELSON.

(81 La. Ann. 434.)

Negotiable instruments — waiver of protest.

A waiver of protest by the indorsers of a promissory note includes a waiver of demand.

ACTION on promissory note. The opinion states the facts. The plaintiff had judgment below.

G. L. Hall, for appellee

Richard Shackelford, for appellant.

WHITE, J. The defendants are sued as indorsers of two promissory notes, one for two thousand and the other for two thousand five hundred dollars, both dated Memphis, Tenn., April 15, 1873, and payable respectively on the 12th and 15th January, following their date. The firm of Nelson, Lanphier & Co. filed no answer, and judgment by default was rendered and confirmed against it. R. H. Short defends, on the ground of want of due demand. There was judgment against him in the lower court, and he appeals. The notes contain the following agreement or consent written on them :

“On this note we hereby waive the necessity of either protest or notice. (Signed) NELSON, LANPHIER & Co.,
R. H. SHORT.”

The position of defendant is, that a waiver of protest is not a waiver of demand, and that no demand having been made he is discharged. The fact as to no demand is conceded, and therefore the question to be determined is solely one of law, that is, does a waiver of protest waive demand? We can see no reason why it should not. The protest necessarily includes a due demand ; and if such be the case, the waiver of protest of necessity waived that which was an integral or essential part of the protest. It being true to say that the demand is contained in the protest, it must be equally true to conclude that the waiver of protest waives the demand which is included in it. This conclusion is abundantly

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supported by authority. The rule is thus stated by Daniels : "So 'waiving demand and notice,' or 'I waive protest and notice,' * * * though somewhat variant in expression have the same significance, a waiver of all steps usually taken to bind the indorser. * * * The words 'I waive protest,' or 'waiving protest,' or any similar phrase importing that the protest is waived, are, when applied to a foreign bill, universally regarded as expressly waiving presentment and notice. * * * In waiving protest the party is considered as not only dispensing with a formality, but as dispensing with the necessity of the steps which must precede it, and of which it is merely the formal though necessary proof which the law requires." In speaking of inland bills, he adds: "Inland bills and promissory notes may be protested, by statutory enactment in many States, and the protest is accorded the same effect as to them when it is made, though it is not necessary to make it. And the weight as well as the number of authorities predominate in favor of construing a waiver of protest to signify as much when applied to inland bills and notes as when used in respect to a foreign bill. And such seems to us clearly the correct conclusion." 2 Dan. on Neg. Insts. 124, 125 ; Pars. on Bills and Notes, 576, 577, 578. These views of the text-writers are the expression of the law as applied in many adjudicated cases. *Porter v. Kemball*, 53 Barb. 646; *Fisher v. Price*, 37 Ala. 407; *Jacard v. Anderson*, 37 Mo. 91; *Carpenter v. Reynolds*, 42 Miss. 807; *McIlvaine v. Brady*, 1 Ohio ; *Gordon v. Montgomery*, 19 Ind. 110 ; *Carson v. Russell*, 26 Tex. 452. In fact, we have been able to find no authority saying that a waiver of protest does not of necessity waive demand. Our jurisprudence has long since given a narrower construction to the waiver of protest than that given in most of the books, by concluding that such a waiver does not *per se* waive notice of protest. *Wall v. Bry*, 1 La. Ann. 312; *Bird v. Le Blanc*, 6 id. 470 ; *Wilkins v. Gillis*, 20 id. 538.

While we adhere to this now settled rule of commercial law, we consider that the authorities by which it was established, by strong implication, say, that the waiver of protest is a waiver of demand. In fact, in the leading and well-considered case of *Wall v. Bry* the matter was so determined. This court then said: "The term 'regularly protested' fairly imports a protest made upon due demand. Does it go further, and dispense with notice? The party waives protest, and is certainly to be held to be as fully bound as if the

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notes had been duly protested." And after drawing the distinction between protest and notice, said that in consequence of the waiver of protest "the plaintiff when he offered this agreement in evidence stood in the same position as if he had offered a notarial protest, and nothing more." These views dispose of the case.

Judgment affirmed.

Rehearing refused.

STATE V. BOTT.

(81 La. Ann. 668.)

Constitutional law — Sunday liquor law.

A law authorizing the prohibition of the sale of intoxicating liquors on Sunday is constitutional.*

CONVICTION of selling intoxicating liquors on Sunday. The opinion states the case.

W. N. Potts, district attorney, for appellee.

Herron, Bird & Beale, for appellant.

MANNING, C. J. The defendant is prosecuted for openly and publicly selling intoxicating liquors on Sunday, and on conviction was fined fifty dollars. It is the first appealed prosecution under what is known as the "Sunday law." The general assembly in 1878 (Sess. Acts, p. 135) delegated to the police juries full and plenary authority to make such regulations as they may deem proper in regard to the sale, barter, or exchange of intoxicating liquors or merchandise on Sunday, and to totally prohibit the same on Sunday, if in their judgment necessary. Violations of the jury ordinances, made under this act, are to be considered misdemeanors, and the penalties are to be enforced by indictment and information, and the power thus conferred upon these juries is to extend over and apply to all incorporated towns and villages within the limits of the respective parishes.

* To same effect *State v. Common Pleas* (36 N. J. 72), 13 Am. Rep. 422.

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The defendant moved to quash the information on several grounds :

1. The act of 1878 violates section 10 of article 2 of the Constitution of the United States in this, that the defendant had paid for a license for carrying on his business during the whole of the present year, and the police jury's ordinance prohibiting it on Sunday violated a contract.

2. That it violates article 110 of our State Constitution in that it impairs the obligation of a contract, and divests vested rights, for no purpose of public utility, and without adequate compensation.

3. That it violates article 12 of the Constitution, in that it is not intended as a police or sanitary regulation, but to enforce the observance of the Christian Sabbath.

4. That it is in violation of "the law of the land," is without public utility, and unwarrantably, unnecessarily, and arbitrarily restricts defendant in the use of his capital and the pursuit of his lawful and licensed business.

5. That the objects of the law are not expressed in its title, in this that the title does not indicate that violations of the jury ordinance are made misdemeanors, punishable by indictment or information.

6. That the act was intended to confer on incorporated towns and villages the power therein granted to police juries, and not to confer upon the juries power to pass ordinances affecting towns and villages.

7. That the act is not applicable to incorporated cities, but only to incorporated towns and villages, and as Baton Rouge is a city, it is not covered by the act.

It is unnecessary in this case to consider the regulation of the police jury affecting any other matter than the sale, barter or exchange of intoxicating liquors on Sunday, and we confine ourselves to that question, pretermittting any other aspect of the regulation or prohibition than that which relates to the sale, barter or exchange of that kind of beverages. We shall examine the several grounds of the motion in their order :

1. The objection, that regulations such as this are in conflict with that clause of the Constitution of the United States which forbids the States passing laws violating the obligation of contracts, has been often considered, and Cooley says: It has been invariably held

that this clause does not so far remove from State control the rights and proprieties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. It is held that all contracts and all rights are subject to this power, and regulations which affect them may not only be made by the State, but must also be subject to change from time to time, with reference to the general well-being of the community, as circumstances change, or as experience demonstrates the necessity of such changes. Const. Lim. 574.

2. The same author says that the power to make these regulations has been sustained, when the question of conflict with State Constitutions, or with general fundamental principles, have been raised. They are regarded as police regulations, established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances. There is no instance, in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of statutes whereby the sale of intoxicating liquors is entirely prohibited, and the demolition and destruction even of the building used for that purpose is commanded; and it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare that it exceeded the proper province of police regulation. Id. 583.

3. This is the rock upon which the prosecution would split, if it really existed.

The constitution of the United States forbids the Congress from making any law respecting an establishment of religion, or prohibiting the free exercise thereof. But this is an inhibition to Congress only, leaving to the State governments the whole power over the subject of religion. There are considerable differences in the various State Constitutions on this subject, but the general provision of the most perfect equality before the law of all shades of religious belief is common to all of them.

It has been frequently said that Christianity is a part of the law

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of the land, and while in a certain sense and for certain purposes it may be true in those States which adopted and have retained the common law, it must be remembered that system never prevailed, nor had any lodgment in this State, save the brief period between the acquisition of this country by the United States and the act of 1805, when the criminal part of that system was in force. Mr. Justice STORY said in the *Girard Will* case, that although Christianity is a part of the common law of the State (Pennsylvania), it is only so in this qualified sense, that its divine origin and truth are admitted. *Vidal v. Girard*, 2 How. 198. And it has been said by another court, that Christianity was never considered a part of the common law, so far as that for a violation of its injunctions, independent of the established laws of man, and without the sanction of any positive act of the Parliament of England, made to enforce those injunctions, any man could be drawn to answer in a common-law court. *State v. Chandler*, 2 Harr. 555.

Some of the States of the original thirteen had prohibitions of blasphemy, profanity and the like in force, as existing in the common law of England at the time of their separation; and statutes of the most vigorous kind were passed in some of them, indicating with minute precision what should and what should not be done on Sunday, for example, the Blue laws of Connecticut. We have been as yet spared in this State the infliction of similar outcroppings of the spirit of Puritanism, and the same learned author already quoted well says: The laws against the desecration of the Christian Sabbath, by labor or sports, are not so readily defensible by arguments, the force of which all would admit. It is no hardship to any one to compel him to abstain from public blasphemy or other profanity, and none can complain that his rights of conscience are invaded by this enforced respect to a prevailing religious sentiment. But the Jew, who is forced to respect the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second Sabbath in each week, unjustly though indirectly punishes him for his religious belief. Const. Lim. 476.

If therefore the regulation had for its object the enforcement of the observance of the Christian Sabbath as charged in the third ground of the defendant's motion, it would be open to assault; but it is manifestly a police regulation. Like the prohibition of the

sale of intoxicating liquors on election day, it is a regulation under the police power of the State for the preservation of public order. Blackstone's definition of the police power of the State is, "the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations" (4 Com. 162), and this definition has not been improved by modern writers. An eminent judge has described it as "the power vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same." SHAW, C. J., in *Com. v. Alger*, 7 Cush. 84. And he adds, "it is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or to prescribe limits to its exercise."

Herein lies the whole difficulty in this and similar regulations. The distinction between a regulation, made solely in virtue of the police power, and for the preservation of the public order alone, and one made for the observance of a particular day, set apart by the votaries of a particular religion for special religious purposes, is often difficult to explain or define, and must in general be left for determination in each case. The general proposition may be enunciated, that the preservation of the public morals and of public order is peculiarly the subject of legislative supervision, and whether the prohibited act is made a criminal offense, punishable under the general laws, or subject to punishment under municipal by-laws, or parochial ordinances, are questions which the legislature must decide; and Cooley on this point adds the significant caution, that "whatever deference the Constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy is always to avoid with care any compulsion which infringes the religious scruples of any, however little reason may seem to others to underlie them." *Id.* 478.

4. This ground, that the prohibition is in violation of "the law of the land," has been considered in the discussion of the others. Mr. Webster defined this expression in the *Dartmouth College*

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case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society." We have endeavored to demonstrate that the regulation in question does not affect any immunity which may not be abridged or even destroyed when the interests of public order require it.

5. The title of the act is sufficiently comprehensive. It indicates very clearly its whole purpose. No one after reading it could fail to be informed of the object of the legislation, and that is the intent of the constitutional provision upon that subject.

6. This is untenable. The phraseology of the act—the powers thus conferred shall *extend over* and apply to all incorporated towns and villages—precludes such construction.

7. The claim that incorporated cities are not subject to the act, but only towns and villages, does not much impress us. Many towns have the same weakness for assuming a title that imports broad territorial area and large population, that some of their inhabitants have latterly developed to appropriate the grand names of historic personages, but the baptism of a legislative act neither enlarges their dimensions nor swells their numbers. The use of the borrowed designation may be permitted for the indulgence of a pardonable vanity, but not to protect against the penalty of a violated law.

Judgment affirmed.

BOARD OF TRUSTEES OF NEW IBERIA V. SERRETT.

(31 La. Ann. 719.)

Estoppel of collector of tax to deny power of imposition.

The keeper or owner of a warehouse who has collected, on behalf of a municipal corporation, a tax levied by the corporation on goods consigned to him, is estopped from setting up a want of authority in the corporation to impose the tax.

ACTION to recover tax collected by defendant. The opinion states the facts. The defendant had judgment below.

Board of Trustees of New Iberia v. Serrett.

Joseph A. Breaux, for appellant.

W. B. Merchant, for appellee.

MANNING, C. J. The authorities of the town of New Iberia made regulations touching quarantine while the yellow fever was prevailing last year. One of them was that packages of goods and merchandise should not be brought within the town, or landed there by steamboats coming from the places infected with the fever. A police had necessarily to be employed to enforce this and other regulations, and extraordinary expenses had to be incurred in paying for this service. In order partially to assist in defraying the expenses of this police a tax of five cents on each package was laid by the town council or board of trustees. The defendant received as consignees or warehousemen enough packages to amount to \$170.57, and paid over \$33.41, the receipts for September, and refused to pay any more on the ground that the tax was illegal, and unauthorized by the charter. This suit is brought to recover the residue of the sum collected by Serrett.

The defendant excepted: "That the plaintiffs have no cause of action against defendant, because they are without authority in law to establish and maintain a quarantine, and to impose upon defendant, and others engaged in the business of keeping warehouses for storage, the burden of maintaining the same by requiring them to pay a tax of five cents on each package shipped to their care; that the trustees of New Iberia can impose no tax, or carry on the business of warehousemen and impose charges therefor, unless authorized to do so by the charter; that no such power or authority to do so is either expressed or necessarily or rationally implied by the powers that are expressly granted them in the charter approved September 25, 1868, nor in any of the acts which said charter pretends to amend; that whatever power or authority the police jury of this parish may have in the premises could not be transferred by them to plaintiffs."

The authorities of incorporated towns and cities are authorized to enact ordinances to protect them from the introduction of contagious and epidemical diseases. Rev. Stat., § 2452. The defendant concedes that New Iberia being an incorporated town, its municipal authorities have power to enact and enforce all necessary police regulations to prevent vessels, goods, or persons from being

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landed within its limits when such landing might introduce contagious or epidemical diseases, but denies that they can by taxation raise the funds necessary to make the protection of these regulations effectual. The argument is, that the town can lay no tax not expressly authorized by its charter, and the taxation of the occupation of warehouse-keeper is not authorized by that charter.

We rest the case on wholly different grounds. It is alleged in the petition that the defendant under the ordinance of the town council collected the sum mentioned in the petition, and for the purposes of the present trial that allegation is taken as true. It is also alleged that he actively participated in encouraging the adoption of this and other ordinances to keep away the scourge that was then spreading terror through the land, and that he had assisted in maintaining these regulations, and in executing them—that the police jury co-operated with the trustees of the town in these matters, and adopted an ordinance on the same subject, and the defendant was a member of that body, and voted for it.

We apply the estoppel by conduct to the defendant. He treated the tax as legal, collected it, and it would be monstrous if he could now keep the money in his pocket under the pretense that he had no right to collect the tax because the corporation had no right to lay it.

On the general ground of the power of the authorities to make such regulations as are indispensable to the protection of communities from epidemic diseases, we should be inclined to go as far as the text and policy of the law would warrant. This court said in an early case: "The police of cities require many regulations, which grow out of their situation, climate, and their population. An illustration of this may be found in the general recourse to quarantine regulations in warm climates, and the rare resort to them in cold ones. In a city like ours, where a dreadful epidemic, frequently returning, checks its growth and occasions great mortality among the citizens, too much care cannot be taken to remove the causes which give rise to it. We have no doubt that the spirit and intention of the act of the legislature was, as its language indicates, that an extensive discretion should be vested in the city council. A much stronger reason than that now before us must be presented to induce the court to interfere, and say that regulations, having for their object public health, were beyond their power." *Milne v. Davidson*, 5 Mart. (N. S.) 410.

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It is ordered and decreed that the judgment of the lower court, maintaining the exception and dismissing the suit, is avoided and reversed, and that the case be remanded to the lower court to be proceeded with in due course of law, and that the plaintiff have and recover of the defendant the costs of this appeal.

Judgment reversed.

DESOBRY V. TÊTE.

(31 La. Ann. 809.)

Bankruptcy — fiduciary debt.

Where a sum of money is received by a factor and commission merchant, under a written stipulation of the factor that he received the money to be invested by him for the owner's account, the debt thus incurred by the factor is a fiduciary one, and under the United States Bankrupt Act of 1867, is not affected by the factor's discharge in bankruptcy. (*See note, p. 235.*)

The balance due by a factor to his client, whether liquidated by the promissory note of the factor, or not, is not, in the hands of a transferee of the client, a fiduciary debt, and therefore is extinguished by the factor's discharge in bankruptcy.

Barrow & Pope and Harry L. Edwards, for appellee.

Singleton & Browne and E. W. Huntington, for appellant.

MARR, J. In February, 1870, the plaintiff deposited with defendant Tête, a commission merchant, \$22,000, for which Tête gave him a receipt as follows: "\$22,000. Received, New Orleans, February 3d, 1870, from Mr. Louis Desobry, the sum of twenty-two thousand dollars, to be invested for his account, interest on said amount to be paid every six months."

On the 18th February Desobry placed with Tête the additional sum of \$3,000, of which \$2,000 were withdrawn on the 6th February, 1871, leaving balance \$23,000, in the hands of Tête.

Tête was the factor and commission merchant of Dardenne and wife, and on February 10, 1872, there was a balance due them of \$2,000, which Dardenne left with Tête, taking Tête's note for the amount, at one year, to his order. On the 11th August, 1873, Dardenne and wife transferred this note to plaintiff.

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Tête was also the commission merchant of Edward Desobry; and, on the 24th January, 1873, there was a balance in his favor of \$1,068.48. On the 14th August, 1873, Edward Desobry transferred this account to plaintiff.

Tête suspended about January, 1873. On the 26th July he was adjudicated a bankrupt, on his own petition; and, in due course, he was finally discharged.

In November, 1873, this suit was brought by Louis Desobry to recover the aggregate of the several claims just mentioned, amounting to \$26,065.48. Tête pleaded and relied solely upon his discharge in bankruptcy, but the plaintiff had judgment.

MANNING, C. J. The Bankrupt Act of 1841 forbade the discharge of a debtor from debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity."

The Bankrupt Act of 1867 provided that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public office, or while in any fiduciary character, shall be discharged."

The Supreme Court of the United States held that a factor was not within the exceptions of the act of 1841, not being included in the general designation "other fiduciary capacity" — ruling that those words must mean the same class of trusts as those specifically mentioned, all of which were special and not implied trusts. *Chapman v. Forsyth*, 2 How. 202. There has been no decision of that court upon this portion of the corresponding clause of the act of 1867, the case of *Neal v. Clark*, 5 Otto, 704, dealing alone with that part of the clause which relates to "fraud," and settling only that constructive fraud is not within the meaning of that act.

Meanwhile the State courts have differed as to whether the changed phraseology of the last act imparts to it a different meaning from the first.

The Massachusetts court hold that the phrase "fiduciary character" does not include the obligation of a debtor, to whom accepted bills of exchange were delivered by their owner with directions to collect them and apply so much of their proceeds as was necessary to the payment of debts owing by the owner to the estate of a deceased person, of whom the debtor was administratrix — saying that the phrase implies a fiduciary relation existing previous to or

independent of the particular transaction from which the debt arises, and that in that case the debt arose out of a single transaction and its creation involved no element other than that of contract. The court there apply the ruling in *Chapman v. Forsyth*, for the reason that the language of the two Bankrupt Acts is "substantially the same." *Cronan v. Cotting*, 104 Mass. 245; s. c., 6 Am. Rep. 232.

The Missouri court say the language of the act of 1867 seems to have been made broader intentionally, and that a factor stands in a fiduciary relation to his principal in respect to the proceeds of goods sold, and his debt thus incurred is not discharged under that act. *Lencke v. Booth*, 47 Mo. 387; s. c., 4 Am. Rep. 326. Similar decisions have been made by other courts which were elaborately set forth in *Banning v. Bleakely*, 27 La. Ann. 257; s. c., 21 Am. Rep. 554, in which case the same doctrine was maintained, and was reiterated in *Brown v. Garrard*, 28 La. Ann. 870.

The U. S. Circuit Court, sitting at New York, had the question squarely presented, and NELSON, J., said the provision in the act of 1867 was much broader than in the act of 1841, and therefore the case of *Chapman v. Forsyth* did not control the construction of the latter act. *In re Kimball*, 6 Blatchf. 292. On the other hand, in the U. S. Circuit Court, sitting at Charleston, WAITE, C. J., ruled that the debt due by the defendant in that case as a factor or commission merchant is not such a debt, contracted in a fiduciary capacity, as is contemplated by the act of Congress to be exempted from the operation of a discharge in bankruptcy. *Owsley v. Cobin*, 15 Nat. Bankr. Reg. 489.

Whatever may be the grounds of these conflicting decisions in the State courts and the U. S. Circuit Courts, — whether based upon the idea that the language of the act of 1867 is more comprehensive than that of 1841, or that the relation of a factor to his principal, *quoad* the proceeds of goods sold, is essentially fiduciary in its character — the legislation of this State has attached the quality of a trust to that relation, has conferred upon it the responsibilities ensuing therefrom, and has affixed criminal penalties to its violation. Rev. Stats., § 905.

The words "while acting in any fiduciary character," employed in the act of 1867, will be construed in each State with reference to its own legislation, and the present contrariety of opinion will doubtless continue until a decision of the U. S. Supreme Court shall have definitively settled their interpretation. The legislation

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of this State has stamped the relation of the factor with his principal with the character of a fiduciary, and the consequences of that relation having been formally adjudicated in *Banning v. Bleakley*, we shall adhere to that ruling and apply it to the present case.

Upon the matters of fact tending to show what relation existed between Tête and Desobry, we are satisfied that it was fiduciary in its character as to the sum of \$22,000 for which the receipt of Feb. 3, 1873, was given, and as to the sum of \$1,000, balance of account on Feb. 18, 1873. If the testimony, offered to show a parol agreement, varying the written receipt, be admissible, the most that can be said of it is that it is contradictory, and does not conclusively establish the change of the contract. If it be inadmissible, the receipt speaks for itself, and the accounts rendered Desobry by Tête from time to time are in conformity with the stipulation in the receipt that the money was "to be invested for Desobry's account." In these accounts Desobry was credited with the revenues derived from the investment, as if they were collected from third parties.

But Tête did not hold the relation of fiduciary to Desobry as to the Dardenne note for \$2,000, nor as to the balance of account with Edward Desobry, both of which were acquired by Louis Desobry by transfer. The judgment of the lower court was error as to these two items. Therefore it is ordered and adjudged that our former decree is set aside and annulled, and that the judgment of the lower court is reversed as to the two items of \$2,000 and \$1,065.48, and is affirmed for the sum of twenty-three thousand dollars, with five per centum per annum interest from February 18, 1873, and the costs of the lower court—the costs of this appeal to be paid by the plaintiff and appellee.

NOTE BY THE REPORTER. — MARR, J., delivered the following dissenting opinion: I cannot concur in the opinion and decree pronounced on the rehearing in this case; and I adhere to the views expressed in the original opinion.

If it be conceded that the pleadings are sufficient to raise that issue, the single question would be, "was the debt created while Tête was acting in any fiduciary character, within the meaning and intendment of the Bankrupt Act?" and I do not think that the law of Louisiana (R. S. 1870, § 905) has any bearing on this question.

This section is but the re-enactment of section 81 of the act of 1855, p. 142, which was the re-enactment of section 1 of the act of 1845, p. 46. The single object of this statute was to punish the crime of embezzlement; and the penalty is imprisonment in the penitentiary, at hard labor, for not less than one year and not more than seven years. This penalty is imposed upon "any servant, clerk, broker, agent, consignee, trustee, attorney, mandatary, depositary, common carrier, bailee, curator, testamentary executor, administrator, tutor, or any person holding any office or trust under the executive or judicial authority of this State, or in the service of any public or private corporation or company,

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who shall wrongfully use, dispose of, conceal, or otherwise embezzle any money, bill, * * * or any other property which he shall have received for another, or for his employer, * * * or by virtue of his office, trust, or employment, or which shall have been intrusted to his care, keeping, or possession by another," etc.

These terms are broad enough to include all persons who can commit the crime of embezzlement; but the statute does not use the word "fiduciary;" nor does it attempt to declare what shall constitute a "fiduciary character." The essential difference between larceny and embezzlement is, that the possession of the thing stolen was wrongful *ab initio* while embezzlement can only be committed by one whose possession was originally lawful. In neither case can the crime be committed without the intent to deprive the owner of his property.

The fact that Tête accounted to Desobry semi-annually for the interest agreed upon, ten per cent, for nearly three years, and the additional fact that in none of the accounts rendered by Tête was there any charge by way of commission or otherwise, for investing the capital, or for collecting and accounting for the interest, prove conclusively, to my mind, the absence of any such intent; and these facts would have necessitated the acquittal of Tête, if he had been prosecuted for embezzlement.

No one can be deprived of a right, in consequence of crime, without first having had an opportunity to defend himself against the charge that he committed that crime. When the creditor pretends that the discharge in bankruptcy does not apply to the debt which he demands, because it was created by the crime of embezzlement, the burden is on him to prove the commission of that crime. Even fraud, not punishable as a crime, cannot be proven without being distinctly charged: and it would be strange, indeed, if any crime could be inquired into collaterally, in a court exclusively of civil jurisdiction, where that crime is not plainly and unequivocally charged in the pleadings. I incline to the opinion, that where the creditor attempts to hold the bankrupt liable, notwithstanding his discharge, on the ground that the debt was created by embezzlement, he is bound to produce the record of conviction of that crime.

The final decree in this case is not based upon the assumption that Tête was actually guilty of the crime of embezzlement, because every one is presumed to be innocent of crime until his guilt has been proven; because he was not even prosecuted for, much less convicted of this crime; and because he was not charged with it in the pleadings. The opinion proceeds upon the theory that the statute referred to raises to the dignity of a "fiduciary character" each one of the persons punishable for embezzlement; and that this crime can be committed only by one who is acting in a "fiduciary character."

It is certainly true that embezzlement cannot be committed by any other than one in whom a certain degree of confidence has been reposed; but the question still remains, "Can the crime of embezzlement be committed only by one who is acting in a fiduciary character, within the meaning and contemplation of the Bankrupt Act?" In the strongest view of the case against Tête, he was merely the gratuitous agent of Desobry, to invest the money intrusted to him for that purpose. So far as the statute is concerned his liability in this relation is no greater than that of a factor, or of any other of the persons designated, all of whom are placed in the same category with respect to the crime against which it is levelled. If the "fiduciary character" is to be deduced from the fact that Tête occupied toward Desobry one of the relations mentioned in the statute, it would logically follow, as our predecessors decided in *Banning v. Bleakeley*, 27 La. Ann. 257; s. c., 21 Am. Rep. 554, that he was acting in a "fiduciary character," with respect to Edward Desobry, whose crops he received and sold as consignee and factor.

I cannot accept the decision in *Banning v. Bleakeley* as an authoritative interpretation of section 33 of the Bankrupt Act, because, in my opinion, it is directly in conflict with the jurisprudence of the Supreme and Circuit Courts of the United States as established by the cases cited in the original opinion. There is nothing in the statute of Louisiana applicable to a factor, or other agent or attorney, which is not equally applicable to menial servants; and the menial servant, with respect to the petty sums intrusted to him for daily domestic purposes, occupies, with respect to his employer, the same relation, differing only in degree and importance, as the clerk, or broker, or attorney, or factor, or other agent. If these persons while performing the functions of their engagements are acting in a "fiduciary character" simply because the statute makes them amenable to a criminal

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prosecution for embezzlement, the menial servant occupies the same relation, for the same reason, while performing the functions of his employment.

The mere reading of section 83 of the Bankrupt Act shows that the Congress meant and intended that the crime of embezzlement might be committed by one who was not acting in any fiduciary character, within the purview of that section : that there might be a defalcation of a public officer which would not constitute the crime of embezzlement ; and that a debt might be created by one while acting in a fiduciary character which would neither be the consequence of the crime of embezzlement nor of a defalcation by a public officer. I cannot undertake to say precisely what the Congress meant by the words "any fiduciary character," nor how that character is to be created ; but it seems clear to me that the courts of the United States, in the several cases cited in the original opinion, maintain the doctrine that the fiduciary character contemplated is not the relation which the law of any State may imply from the contract out of which the debt or pecuniary obligation arises. The Constitution has conferred upon Congress no power to establish any other than uniform laws on the subject of bankruptcies, throughout the United States; and uniformity requires that the discharge shall be operative alike, to the same extent, in each and all of the States. In one State certain debts and obligations may be treated as fiduciary, which in some other State might not be so regarded ; and if reference is to be had to the local laws and jurisprudence of any State, in order to ascertain what is a fiduciary character, in the intendment of the Bankrupt Act, it might well happen that the discharge would be an effectual bar in one State while in another State it would not relieve the bankrupt.

In my opinion the testimony of Tête was admissible ; and taken in connection with all the facts and circumstances of the case, it satisfies me, as a matter of fact, that the relation between him and Desobry was, with the knowledge and by the consent of Desobry, that of debtor and creditor ; that the debt was not created by fraud or embezzlement on the part of Tête, nor while he was acting in any fiduciary character, within the scope and meaning of the Bankrupt Act ; and that it is not excluded from the operation and effect of the discharge.

The concurrence of all the other members of the court in the opinion and decree pronounced on the rehearing has made it necessary for me to state the grounds of my dissent. The questions involved are of very great importance ; and they are so presented in this case that they may be reviewed and finally settled, as I trust they will be, by the arbiter in the last resort, the Supreme Court of the United States.

See *contra* the principal case, *Woolsey v. Cade*, 54 Ala. 378 ; s. c., 26 Am. Rep. 711; *Henniquin v. Cleve*, *post*. In *Kaufman v. Alexander*, Texas Supreme Court, Austin Term, 1880, a case of a commission merchant selling goods of a principal, and failing to account for the proceeds, it was said :

"Our conclusion is, that the demand of plaintiffs is for a debt due them by their agents, growing out of and contemplated by the contract between them, and not, so far as the evidence shows, involving any bad faith or breach of trust on the part of the agents, in appropriating, as their own, that which, by reason of their fiduciary relation, they were bound to hold in trust for their principals. Whilst there is quite a conflict of decisions as to the proper construction of this clause of the Bankrupt Act, and especially as to its application to a demand by a consignee against a factor, it is not believed that any of the cases named require the exclusion from the benefit of the bankrupt laws of all debts growing out of an agency to sell, or of such a debt as we understand this to be. An important element in this case, and not in some of the cases, as to factors and commission merchants is, that under the contract the proceeds of sale did not become the property of the principal, so as to make it wrongful in defendants to use those proceeds, or mingle them with their own money. *Bunning v. Bleakley*, 27 La. Ann. 257 ; s. c., 21 Am. Rep. 554.

"This court has held 'a debt growing out of the conversion, by an attorney, of his client's money or property in his hands, as such,' to be a debt created whilst acting in a fiduciary character. *Flannagan v. Pearson*, 43 Tex. 1. Such a breach of duty involved moral delinquency by one held to be acting in a fiduciary capacity, within the spirit of the decisions embracing the Bankrupt Law of 1841. We are inclined to regard the latter rule as laid down in those decisions, which, except the clause in question, is substantially the same as in the law of 1841, thus adopt and retain the benefits of the fixed fiduciary construc-

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tion given to the expression 'fiduciary capacity,' under the act of 1841. *Oronan v. Cotting*, 104 Mass. 245; s. c., 6 Am. Rep. 232; *Hennequin v. Cloux*, 77 N. Y. 437; *Kemis v. Gruf & Co.*, U. S. C. C., West. Dist. Penn., 1878, 5 Rep. 489; *Chapman v. Forsyth*, 2 How. 202; *Neal v. Clark*, 95 U. S. 704. In the last cited case the Supreme Court of the U. S., whose decision 'would be final on questions of which it takes cognizance,' quoted largely from *Chapman v. Forsyth*, 2 How. 202, with the proposition 'a factor is not, therefore, within the act.' But according to our view of the present case, it is not necessary for us to go to that extent. The demand of the plaintiffs, as developed in the record, 'was not of a fiduciary character, and was discharged by the proceedings in bankruptcy and composition.' "

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

MAYOR, ETC., OF BALTIMORE V. RADBOKE.

(49 Md. 317.)

Municipal corporation — nuisance — stationary steam engine in city — power of authorities to remove.

A stationary steam engine in a city is not in itself a nuisance; and an ordinance prohibiting any person from putting one up without the consent of the mayor and common council, and allowing the revocation of such permits and compelling the removal of such engines, on six months' notice, under a prescribed penalty, is unreasonable and void, although the charter authorizes ordinances for the prevention and extinguishment of fire, for the security of persons and property, and for the promotion of the interests and good government of the city.

BILL for injunction. The opinion states the case. The complainant had judgment below.

Thomas W. Hall and James L. McLane, for appellant. This is simply a question as to the power of the city to regulate the use of steam machinery within the corporate limits. The possession of this power depends upon the charter of the city, either as conferred by express terms or by necessary implication. This power is clearly derived from the general power to pass all ordinances necessary to give

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effect and operation to all the powers vested in the corporation of the city. The special jurisdiction or authority over the subject-matter of this controversy may be referred, first, to the power to pass ordinances for the prevention and extinguishment of fires; second, to the power to pass ordinances for securing property and persons from violence, danger or destruction, and for promoting the great interests and insuring the good government of the city. These powers are usually styled police powers and regulations, and if any one is injured by their exercise it is *damnum absque injuria*, upon the principle that the safety of the people is the highest law, and that every owner of property must use it so as not to injure his neighbor or the community at large. 1 Dill. on Mun. Corp., § 93, p. 210; Cooley's Const. Lim. 572, 594 and 595; *Commonwealth v. Alger*, 7 Cush. 53. If the power is not to be found in these clauses of the city charter, then it is clearly referable to the power to prevent as well as to remove nuisances. Is the by-law or ordinance it has adopted in execution of this power so unreasonable as the courts will be justified in interfering and setting it aside? In the first place if there has been a complete transfer of this power to the city by the State, the mode and the means of its exercise are not legitimate subjects of inquiry by the courts. The selection of the means and the manner of exercising the power are confided to the sound discretion of the municipal authorities. *Methodist P. E. Church v. Mayor, etc.*, 6 Gill, 400; *Harrison v. Mayor, etc.*, 1 id. 277; *Goszler v. Georgetown*, 6 Whart. 595; 1 Dill. on Mun. Corp., § 58. If it be conceded that the mayor and city council has the right to regulate the use of steam machinery within the city limits, then there is nothing unlawful or unreasonable in prescribing the condition as to removal upon notice. If it be conceded that the city has the right to prescribe the terms upon which an engine may be erected, then it follows on the other hand that it may fix the conditions of discontinuance or removal. But then it is insisted that this is not regulation, but prohibition. But this is not so, as the appellee may carry on the business elsewhere in the city, where the danger of loss by fire, or injury to persons and property would not be so great. It would be practicable for him to saw up the material necessary for his boxes at a locality where steam could be used without great risk, and then put the pieces together at his present place of business. The ordinance does not prohibit his business; it simply denies him the right to use in its conduct, at a par-

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ticular place, a motive power, which may prove specially destructive to persons and property, leaving other localities open to him. *Baker v. Boston*, 12 Pick. 194; *Harvey v. De Woody*, 18 Ark. 260; 2 Kent's Com. 340, and note (11th ed.); *Slaughter-house* cases, 16 Wall. 62.

Nor is it a valid objection that the proceeding is against him only, and others carrying on the same business by the same means, in equally dangerous localities, are permitted to go on without interruption or hindrance. If this court should agree with us, it will be in order then to proceed against the others.

E. Duffy and *S. Teackle Wallis*, for appellee.

MILLER, J. The appellee is tenant and occupant of certain premises situated on McClellan's alley, in a central business locality in the city of Baltimore, where he and his father before him had carried on the business of carpentering and box-making since the year 1853. In 1866 he applied to the mayor and city council for permission, which was granted, to erect and use on these premises and in the carrying on of his business, a steam engine. The resolution granting this permit contained a provision, in conformity to a city ordinance on the subject, that the engine was "to be removed after six months' notice to that effect from the mayor." Upon the passage of this resolution he erected and has ever since used a steam engine in his said business, but some time in the year 1873, the mayor gave him notice to remove it, which he refused to do. The city, then, after the expiration of the six months, instituted a suit before a justice of the peace, for the penalty for non-removal provided in the ordinance, and the appellee thereupon filed the bill in this case for an injunction to restrain the prosecution of that action and others which the city threatened to bring from day to day in order to enforce the removal of this engine. The court below on final hearing ordered the injunction to be issued as prayed and made it perpetual. From this order the mayor and city council have appealed.

The city legislation on the subject, in force at the time this permit was granted to the appellee, was first, the 56th section of Ordinance No. 33, approved June 5, 1858, by which it was provided under prescribed penalties that no person should "erect, build or have put up any steam saw mill or machinery, or any steam

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engine for any purpose whatever, or planing machine, or machinery within the limits of the city, without first obtaining the sanction of the mayor and city council ;” and secondly, part of the 5th section of Ordinance No. 78, approved June 9, 1864, which provided that “all permits granted for steam boilers and steam engines and boilers may be revoked, and the same shall be removed after six months’ notice from the mayor, and any one receiving such notice, who shall refuse or neglect to conform to the requirements of the same, shall pay a fine not exceeding one hundred dollars, and a further fine not exceeding fifty dollars, for every day such refusal or neglect shall continue after the first.” It is this last provision which the present case requires us more especially to consider, not only because the bill assails its legality and validity, but because the injunction complained of restrains the prosecution of suits for the penalties which it imposes for non-compliance with the notice and order to remove given by the mayor. It is obvious that those who enacted this provision did not suppose it was an exercise of the power “to prevent and remove nuisances,” for it would be a curious anomaly in municipal legislation on that subject, as well as a novel mode of removing a nuisance, to pass an ordinance allowing a nuisance to remain for six months after the mayor had determined it to be such, before any steps could be taken to enforce its removal. But further than this, a stationary steam engine is not in itself a nuisance even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets. There is no proof in this record of any such interference, or even that this was the ground of the mayor’s action in giving the notice. Nor was this engine used in connection with any trade or occupation which the law pronounces offensive or noxious. The business of carpentering and box-making is neither offensive to the senses nor deleterious to health. In fact the only complaints made against the engine are its liability in common with all other steam boilers to explode, and that it is used in a business in which combustible materials are necessarily brought in dangerous proximity to the fire of its boiler, and it therefore subjects buildings and merchandise in that vicinity to increased danger from fire, raises the premiums of insurance thereon, and excites the fears of neighboring owners for the safety and security of their property, but neither one nor

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all of these circumstances combined, make it a nuisance. *Rhodes v. Dunbar*, 57 Penn. St., 274.

But the legislature has granted ample power of legislation upon the subject of the erection and use of steam engines within the city limits, to the mayor and city council of Baltimore, independent of the power "to prevent and remove nuisances." They are clothed with the power to pass ordinances "for the prevention and extinguishment of fires," for "securing persons and property from danger or destruction, and for promoting the great interests and insuring the good government of the city," and "to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city." It has been well said in reference to such general grants of power that as to the degree of necessity for municipal legislation on the subjects thus committed to their charge, the mayor and city council are the exclusive rights, while the selection of the means and manner (contributory to the end) of exercising the powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians, is committed to their sound discretion. *Harrison v. Mayor, etc.*, 1 Gill, 264. This discretion is very broad, but it is not absolutely and in all cases beyond judicial control. Modern decisions in other States have in some instances extended the control of the courts over municipal ordinances upon the ground of their unreasonableness, further perhaps than the adjudications in this State would justify us in going. The cases on this subject and the conclusions to be drawn from them are well stated by Judge DILLON in his admirable work on Municipal Corporations, in sections 253 to 260. They will also be found collected in Wood on Nuisances, 774, note 1. While we may not be willing to adopt and follow many of these cases, and while we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an ordinance passed under grants of power like those we have cited is so clearly unreasonable, so arbitrary, oppressive or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority. In applying the doctrine of judicial control to this extent, we contravene no decisions in our own State and impose no unnecessary restraints upon the action of municipal bodies. The inquiry then arises is the ordinance in question such as we have

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described? To answer this question it is necessary to consider briefly upon what it operates and what mischiefs or wrongs it is capable of inflicting. It is matter of common knowledge, as well as of proof in this case, that the use of steam engines is absolutely necessary for the successful prosecution of nearly all the various manufacturing, commercial, industrial and business enterprises which are essential to the prosperity of large cities. Great numbers of them are in constant use in the city of Baltimore for purposes so varied and numerous as to embarrass description, and they are to be found in every business locality and in all sections of the town. In fact it may be safely affirmed that their use could not be prohibited or discontinued without the most serious impairment, if not destruction, of the prosperity and growth of the city. Now it is with these powerful and dangerous but most important and valuable aids to human industry, that this ordinance deals, and what does it do? It does not profess to prescribe regulations for their construction, location or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box-factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed,

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it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance, which clothes a single individual with such power, hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void. Resting our decision as to the invalidity of this ordinance on this ground, we shall not consider the question whether it is also void as an unauthorized delegation of a public power or trust. In the view we have taken of the case, it becomes unnecessary to express any opinion upon that question. It must also be observed that what we have declared void is only that part of the ordinance of 1864, which gives to the mayor the power to revoke permits for steam engines and boilers, and we are not to be understood as expressing any disapproval of the section of the ordinance of 1858, which requires a permit from the mayor and city council for the erection of all such engines within the city limits. The act of 1872, ch. 153, which was referred to by the appellants' counsel as containing a ratification and approval by the legislature of both these ordinances contains no reference to the ordinance of 1864. The section of that act which is relied on for this ratification and approval simply provides that "nothing in this act shall conflict with the ordinance of the mayor and city council of Baltimore, which requires their permission for the erection of steam boilers in that city." This in plain terms refers exclusively to the ordinance of 1858, and we by no means affirm that it constitutes a legislative ratification and approval even of that ordinance.

As to the question of jurisdiction we have no doubt. It has been decided by this court in too many cases to be longer open to question, that where a municipal corporation is seeking to enforce an ordinance which is *void*, a court of equity has jurisdiction at the suit of any person injuriously affected thereby, to stay its execution by injunction. This was distinctly announced in *Page's case*, 34 Md. 564, where it is said: "there is no doubt that where an ordinance is void, and its provisions are about to be enforced, any party whose interests are to be injuriously affected thereby may, and properly ought to go into a court of equity and have the execution of the ordinance stayed by injunction. This course of proceeding has been sanctioned and approved by this court in numerous cases," and they refer to *Holland's case*, 11 Md 187;

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Bouldin's case, 15 id. 18, and *Porter's case*, 18 id. 284. To these may be added *Groshon's case*, 30 id. 436; *Gill's case*, 31 id. 375; *Hazelhurst's case*, 37 id. 220, and *St. Mary's Industrial School v. Brown*, 45 id. 310. The averments of the bill as well as the facts established by the proof, bring the present case clearly within the principles upon which jurisdiction in equity was sustained in the cases cited.

It follows that the decree appealed from must be affirmed.

Decree affirmed.

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(49 Md. 233.)

Agency — representations of agent at public sale — how far principal bound.

An agent of a corporation, making public sale of land for his principal, under a mortgage, in answer to inquiry represented that possession would be given within three months. Relying on this, the plaintiff purchased the premises, but not obtaining such possession within that time, and having lost the rents and incurred expense in getting possession, he brought an action of damages against the corporation therefor. *Held*, not maintainable, in the absence of proof of fraud.

ACTION of damages. The opinion states the case. The defendant had judgment below.

Alexander B. Hagner, for appellant.

Alexander Evans and Wm. J. Jones, for appellee.

STEWART, J., The appellant alleges, as the ground of his complaint, that the agent of the appellee, at a public sale of the house and lot, made by the said agent, on account of the default of payment of a mortgage thereon, held by the appellee, represented, upon inquiry being made of him, by the appellant, that possession of the property would be given to the purchaser, within three months from the day of sale. That confiding in this representation, he was induced to bid for the property, and became the purchaser thereof. Possession not having been given him according to the representation, and having lost the rents thereof in the mean-

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time, and incurred expense in obtaining possession, this action was brought to recover damages for the same.

At the trial the appellee asked to have the jury instructed substantially, that such representation was not binding on it, and the appellant could not recover thereon.

1. Because the agreement was not reduced to writing and signed by the defendant or its duly constituted attorney.

2. Because there is no evidence that the agent was authorized by the appellee to make such contract.

The Circuit Court granted this prayer, and the question is, was any error committed thereby?

The fourth section of the statute of frauds refers by its terms and meaning to contracts for the sale of lands, etc., or any interest in or concerning them, and not to collateral or independent undertakings, outside of such contracts, and does not apply to the representation, if any, made at the sale in question.

It was but the assertion of the agent at the time of the contract for the sale of the land, in relation to a different proposition, and formed no integral part of said contract, and its non-performance would not necessarily break up the contract for the sale of the land, unless it might so operate by reason of any fraud connected with the sale, which would stand on different ground.

If the representation were made fraudulently to induce the purchaser to bid for the property, and he was induced thereby to buy the same and sustained damage, he would be entitled to recover for the tort, fraud or deceit. Besides, the fraud would constitute ground for the court of equity to refuse to ratify the sale. The agent, and the principal, if it authorized the representation to be made, would both be answerable. The cases of *Lamborn v. Watson*, 6 H. & J. 252, 14 Am. Dec. 275, and *Duvall v. Peach*, 1 Gill, 172, relied upon by the appellee, recognize the distinction. See also *Benj. on Sales*, 419.

Although the representation might be false in fact, if innocently made by the agent, believing in the truth of what he asserted, it would afford no ground of action. To constitute the fraud and deceit, the representation must be false and knowingly made. The concurrence and fraudulent intent and false representation, and damage resulting therefrom constitute the ground of action. *Benj. on Sales*, 338.

What constitutes fraud cannot be precisely defined. No kind of

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artifice employed by one person to deceive another, if he is not deceived thereby, however false and dishonest, and made to deceive, will constitute a fraud, supporting the right of action, if the other party knows they are false, discovers them and is aware of the truth.

In such case the other party is not deceived by them, and if he makes his contract notwithstanding, he has no right to rescind it on that account, and cannot recover in an action for tort or in the nature of deceit. See *Benj. on Sales*, 314, 315.

The responsibility of the appellee as a corporation for the acts of its agent, is just the same as that of any other person. Natural persons are liable for the wrongful acts and neglects of their servants or agents, done in the course of their employment, and private corporations upon the same grounds of public policy are amenable to the same extent. The person, natural or artificial, in such case is liable, whether the act of the agent inures to his or its benefit or not, because an innocent person has been deceived, and damaged by confiding in the agent, accredited by the principal as worthy of trust in that particular business, whether the principal intended to authorize the acts or not, or forbade them, or disapproved of them, is immaterial. The rule *respondeat superior* founded on principles of public policy governs in such case, because when one of two innocent persons must suffer by the hand of another, he who enabled him to commit the same, by giving him the credit, must be the sufferer.

But the agent's authority must be measured by the extent of his employment, and the principal is liable to third persons in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences and omissions of duty of his agent, in the course of his employment.

These principles are fully established, and are clearly and distinctly stated in the case of *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 44; s. c., 17 Am. Rep. 540.

The rule of *caveat emptor*, applying to sales made by trustees, *Anderson v. Foulke*, 2 H. & G., 346, and *Neel v. Hughes*, 10 G. & J., 7, does not shield a party rendering himself liable to an action for fraud and deceit, perpetrated at a sale thus made.

But here the sale was made to foreclose a mortgage, which contained a power of sale in case of default.

Although Jones was not mentioned in the mortgage as the attor-

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ney to make the sale, but he was acting under the appointment of the appellee, his powers in making the sale must be found in the mortgage authorizing the sale. That marks out and distinctly furnishes the authority, when he is duly appointed by the mortgagee. Any sale made by him is subject to the ratification of the court, and if any fraudulent or improper representations are made by the attorney or trustee, they would afford ground for refusal to ratify the sale. So far as the appellee is concerned, and his power as its agent, he must be treated as confined to the line of duty, prescribed by the mortgage, and the law applicable to any sale made by him. No power was conferred upon him to make such representations as alleged. If made, they were outside of the scope of his employment, and the appellee is not bound thereby.

It follows, that although the first reason given for the granting of the prayer is not tenable, the appellant incurred no injury thereby, as the appellee was not bound by the representations of the agent if made as alleged.

Judgment affirmed.

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(49 Md. 257.)

Municipal corporation — defective bridge — duty of another to repair.

In consideration of permission to cut a public highway with their canal, the duty of bridging the canal and keeping the bridge in repair was by law devolved upon the canal company. The duty of keeping public bridges in repair was by law primarily devolved on the county commissioners. The plaintiff was injured by a defect in the bridge. *Held*, that the county commissioners were liable to him therefor.

ACTION of damages for personal injury. The opinion states the case. The defendants had judgment below. The appellant's fourth instruction was as follows :

4. If the jury find from the evidence in the case, that the Chesapeake & Ohio Canal Company cut a canal through the public road in Allegany county, described in plaintiff's declaration (if the jury find such road was a public road) and built the bridge in question over said canal, and thereby connected the two parts of said road so severed by said canal company, then the jury are instructed that

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said bridge as soon as erected was dedicated to the use of the public on said highway, and became subject to the control of the county commissioners of Allegany county; and that if the jury further find, that the plaintiff, whilst riding on said bridge, and using due care, was injured by reason of the defective condition of said bridge, resulting from the negligence of the defendant in not keeping the same in repair, then the defendant is liable to the plaintiff in this action.

The appellee's first prayer was as follows.

1. If the jury find from the evidence in the cause that the Chesapeake & Ohio Canal Company, at or about the time of the completion of its canal, in the year 1851, severed and destroyed the public road leading from Cumberland to the ford in the Potomac river, near Patterson's creek, by cutting said canal through or across said road, then said canal company was bound to reconstruct and keep open said highway for the benefit of the public; and if the jury shall further find, that the said canal company, in obedience to its said obligation, did construct a bridge at said point at or about the time of the completion of said canal, in 1852, and has ever since maintained and kept up said bridge at its own proper charge and expense, through the supervision of its own officers or superintendents; and if the jury shall further believe, that the defendant never, at any time since said bridge became a necessity, has had charge or supervision of the same, or has been called upon to make or has made any levy or appropriation for its repair, then the plaintiff is not entitled to recover against the defendant, even though the jury shall further find that the injury complained of was the result of the defective condition of said bridge so constructed and kept in repair by the said canal company.

William Brace and Benj. A. Richmond, for appellant.

S. A. Cox, for appellee. While the appellee concedes its general duty and responsibility, as an agent of the public, to keep in good repair and safe for general travel, all the public roads and bridges in the county that are under its control, yet in this particular case, it is specially and specifically released, and prohibited from assuming any charge, duty or responsibility in the repair or non-repair of this bridge, by the powers given to the Chesapeake & Ohio Canal Company by its original charter, and subsequent amendments

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thereto in this particular matter, and the duty and obligation which follows and attaches to the grant of such powers.

If, therefore, any duty which formerly attached to it by the statute, has been given to another to perform, or the duty has been limited in extent or degree, either as to the duty itself, or the place of performance; for so much as said duty is limited or its performance released by delegation to another, no matter for what purpose, the responsibility ceases, *pro tanto*, and the appellee is not liable therefor. *Altwater v. Mayor*, 31 Md. 462; *Leopard v. Canal Company*, 1 Gill, 222; *Manly v. St. Helen's Canal & Railway*, 2 H. & N. 849.

MILLER, J. The appellant brought this action against the county commissioners of Allegany county, to recover damages for injuries sustained by reason of the defective condition of a bridge across the Chesapeake and Ohio canal, over which he was riding on horseback. It is admitted that the road on which this bridge was situated was a public county road in Allegany county, leading from Cumberland to the ford in the Potomac river near Patterson's creek, and was such before the canal was constructed. The canal company in constructing their canal cut through and severed this road about the year 1846, and afterward erected a bridge over the canal at the place of severance, and this was the only means of crossing the canal for a distance of eight or nine miles on either side. This bridge was burned down some time during the late civil war, and the bridge standing at the time of the accident was shortly afterward built by the canal company in the place of the one destroyed. The county commissioners insist they are not responsible in this action because the canal company was by law bound to erect, maintain and keep this bridge in repair, and the learned judge of the Circuit Court sustained this defense.

From the nature of the work itself, and the general powers given to construct the canal for several hundred miles along the left bank of the Potomac river, it is clear the canal company were authorized to cross and sever all existing public highways leading to the river throughout the route prescribed by its charter. But in thus cutting its canal across public highways, the company had no power utterly to destroy them, but was bound to unite, for the public accommodation, any highway so divided by a reasonably convenient thoroughfare over or under its canal. *Leopard v. Canal Co.*, 1 Gill, 230.

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In the present instance the company did this by erecting a bridge over the canal, and thereby united the severed highway for the public use and public accommodation. Although there is no express provision in the charter requiring the company to maintain and keep such bridges in repair, yet it is well settled, that where a new way or road is made across another already in existence and use, the crossing must not only be made with as little injury as possible to the old road, but whatever structures are necessary for such crossing must be erected and maintained at the expense of the party under whose authority and direction they are made. This upon review of the authorities was recently decided by this court in the case of the *Northern Central Railway Co. v. Mayor*, 46 Md. 425, to be a principle or rule of the common law. It is therefore certain that the duty of maintaining and keeping this bridge in repair is devolved upon the canal company. But does this fact relieve the county commissioners from responsibility to a private individual, who, as one of the public, is entitled to travel the highway and cross the bridge, for injuries he may sustain, by reason of its being out of repair through the default or neglect of the canal company? That is the question which this case presents, and it leads us to inquire, first, whether the law imposes upon these commissioners any duty or obligation toward the public with respect to this bridge.

By the Code, art. 28, the county commissioners of each county in the State are created a corporation with power to sue and be sued, and among other duties imposed on them it is declared "they shall have charge of and control over the county roads and bridges." They are also required to levy all needful taxes on the assessable property of the county liable to taxation, and to pay and discharge all claims on or against the county, which have been expressly or impliedly authorized by law, and they are specially empowered to "build and repair bridges, and levy upon the property of the county therefor." These powers are conferred by statute upon these bodies corporate to be exercised for the public good, and it is well settled that the exercise of them is not merely discretionary but imperative, and that in such laws the terms "power" and "authority" import duty and obligation. By the construction which this court has in numerous instances placed upon these statutory provisions, which not only impose duties upon these corporate authorities, but provide them with the means and clothe them with the power to discharge such duties, their liability in an action like the present is as

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securely fixed as if the statute had in express terms said, that they shall have charge of and control over all the public county roads and bridges within the limits of their respective counties, and shall keep the same in good repair, so as to be safe and convenient for the passage of persons and property, and shall be liable in an action on the case to any person receiving injury in consequence of any obstruction or defect therein. *Mayor v. Marriott*, 9 Md. 160; *Mayor v. Pendleton* 15 id. 12; *County Commissioners v. Duckett*, 20 id. 468; *County Commissioners v. Gibson*, 36 id. 229; *Flynn v. Canton Company*, 40 id. 313; s. c., 17 Am. Rep. 603; *County Commissioners v. Baker*, 44 Md. 1. Such being the construction and effect of these laws, we are clearly of opinion that the bridge on which this accident happened was a county bridge under the charge and control of the county commissioners, and one which in discharge of their duty to the public they were bound to keep in repair, if the canal company neglected its duty in that respect. It is not a bridge erected by a corporation especially created for that purpose, with power to charge toll for passing over it, nor by a turnpike company authorized to receive tolls for travel over its road, but it is a bridge wholly within the limits of the county, and erected on one of the ordinary public county highways. The canal company was required to erect it, not for its own convenience, nor to facilitate traffic on the canal, but for the "public accommodation," and was bound to make it a "reasonably convenient thoroughfare" for public travel over an existing highway which the canal intersected. We have been referred to the Virginia act of February 27, 1829, by which the canal company was empowered, whenever its president and directors should deem it expedient, to substitute boats in lieu of bridges to accommodate travel across the canal, wherever a public road shall render a bridge or ferry necessary, and such road cannot be conveniently conducted under the canal. Assuming that this power was confirmed to the company in this State by the second section of the Maryland act of 1832, chapter 91, we do not see that it has any important bearing upon the question before us. It matters not whether a ferry-boat or a bridge should be provided in any given instance, for in either case the end to be attained was the uniting of the severed highway for the accommodation and continuance of public travel, and in this case the company did not deem it expedient to substitute a ferry-boat, but erected a bridge which as soon as erected was devoted to the use of the public,

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and became subject to the control of the county commissioners. The appellees' counsel has also referred to the proviso in the 7th section of the act of 1794, chapter 52, to the effect that the duty of road supervisors to mend and repair bridges shall not extend to cases "where persons are or may hereafter be obliged, either by law or contract, to keep bridges in repair." But this law has long since been superseded by other acts of assembly in which no such restriction is found, and this, so far from sustaining the appellees' defense, plainly indicates that the legislature deemed the continuance of such a restriction upon the duties and obligations of county commissioners unwise and inexpedient, and that the public good required they should have charge of and see to it that such bridges, as well as all others on county roads used by the public, were kept in repair. Reference has likewise been made to *Altwater's* case, 31 Md. 462, where it was held the action for the injury there sued for could not be maintained against the mayor and city council of Baltimore. But the non-liability of the city in that case was placed upon the distinct ground, that by legislation subsequent to the decision in *Marriott's* case, the police of the city had been organized as a distinct body of State officials deriving their existence from, and strictly within the jurisdiction of State authority, and not amenable to the city authorities for the faithful discharge of their duties. It was held the action would not lie, solely because the whole police force had been placed in other hands and under other control, so that the city was stripped of the power, and deprived of the means to enforce its ordinance for the removal of the nuisance by which the injury complained of was inflicted. But there has been no such change of legislation affecting the duties and obligations of county commissioners. Their duties remain the same, and they are provided with the same ample power and means to discharge them now, as when all the cases to which we have referred were decided.

The result then is that we have a case in which the obligation to maintain and repair this bridge is, by the common law, cast upon the canal company, but where also the same duty and obligation are imposed by statute upon the county commissioners. In our opinion the obligation of the latter to the public is primary and unqualified. The fact that the canal company is bound to repair does not absolve the county commissioners from their primary duty to the public, nor is their liability

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affected by the fact that the appellant could, if he had chosen, have brought his action against the canal company. These propositions, we think, have been in effect decided by this court in *Gibson's* case, 36 Md. 229, already cited. After the decision in *Duckett's* case, 20 Md. 468, the act of 1868, chapter 299, was passed, by the 8th section of which the county commissioners were directed to require the several road supervisors to give bond conditioned for the faithful performance of their duties, "which bond may be put in suit for the benefit of any person suffering by the neglect of the said supervisor in keeping the roads in his district in proper order;" and in *Gibson's* case, it was contended that because this law gave a right of action upon the bond, the right of action against the commissioners was thereby taken away, and the party injured was compelled to seek his remedy upon the bond of the supervisor. But the court held that this statute merely gave a cumulative remedy, and left it discretionary with the party suffering injury, either to sue on the bond or to bring his action against the commissioners.

Such are the conclusions to be drawn from our own Maryland decisions on this subject, and upon these the determination of the present case must of course depend. Decisions, however, to the same effect have been made in other courts of high authority where similar questions have arisen. In the case of *State v. Gorham*, 37 Me. 451, there was an indictment against the town for neglect in keeping a bridge over a railroad in a fit state of repair. By one section of the Revised Statutes of that State, it was provided that all highways and bridges in any town shall be opened and kept in repair, so that the same may be safe and convenient for travel, and in default thereof the town shall be liable to indictment and fine. By another section it was provided that every railroad corporation shall maintain and keep in repair all bridges and their abutments which such corporations shall construct for the purpose of enabling their road to pass over or under any turnpike road, canal, highway or other way. A railroad company had built its road across one of the highways in the town of Gorham, and over its road built a bridge where the highway formerly was, with abutments, and the indictment against the town was for neglect in keeping this bridge and its abutments in repair. It was there contended, as it has been here, that the fact that the railroad company was required to maintain and keep this bridge in repair exonerated the town from its liability and duty, but the court in a very carefully

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considered opinion sustained the prosecution, and suggested some very practical and sensible reasons for their judgment. "The introduction," say the court, "of railroads, and the frequency with which they cross public ways, as well under bridges, as at grade, has greatly increased the hazards of ordinary travelling. It is important that the most certain, prompt and efficient means should be provided against these now and increasing causes of inconvenience to travellers. Towns have the general supervision of highways. By holding them primarily responsible, a very much more convenient and certain remedy is afforded the public than could be had against private individuals or corporations. Against towns the remedy is simple, speedy and certain; against other corporations or individuals there would be uncertainty as to the existence of the liability, and in many instances still greater uncertainty as to the pecuniary responsibilities of the parties." The court then refer to the case of *Sawyer v. Northfield*, 7 Cush. 490, where the town was exempted from liability under similar circumstances, but clearly show that that decision turned upon the clause in the Massachusetts statute, which required the highways and bridges to be kept in repair by the towns "when other sufficient provision is not made therefor," which made the liability of towns in that State qualified and not absolute. There was no such clause in the Maine statute, nor is there any such provision in our statutes as construed by this court, qualifying the duty and liability of county commissioners, with respect to any particular county highways or bridges, or any class of them. The same doctrine in cases much stronger in favor of the towns was adopted by the Supreme Court of Vermont, in *Willard v. Newbury*, 22 Vt. 458, and *Batty v. Town of Duxbury*, 24 id. 155. In the latter case the opinion was delivered by Judge REDFIELD. The accident occasioning the injury sued for happened on a by-way made by a railroad company to connect the two points of a highway, a part of which the company had occupied in the construction of its road, and the court say: "The consideration that this by-way was made by the railroad company, or that the railroad company were bound to have made it more safe before obstructing the former highway is nothing with which the traveller has any concern. He is not bound to inquire who makes the by-ways, or by what authority obstructions are put upon the highway. But towns, after having reasonable notice of the existence of obstructions in their highways, are bound

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to remove them or make safe by-ways to pass round them, or see to it that they are properly made by others, in order to exonerate themselves from liability to those who have occasion to travel. There is in law no necessary privity between the traveller and any one but the towns, as to the sufficiency of the highways." And the learned judge also adds : " How far this rule is consistent with decided cases in other States it is needless now to inquire. We entertain no doubt upon that subject, and if we did, we should not feel at liberty to disregard the solemn determination of this court upon the very point in so recent a case, *Willard v. Newbury*, upon such mature consideration, and so elaborately discussed at the bar, and where we entertain no doubt of the satisfactory character of the general principles of reason and policy upon which it is founded." Well may we adopt and apply these remarks to the previous decisions of this court to which we have referred, most of which were ably argued and very carefully considered. More recent decisions of other courts have also affirmed the same general propositions. We refer to *Watson v. Tripp*, 11 R. I. 98 ; s. c., 23 Am. Rep. 420 ; *City of Philadelphia v. Weiler*, decided by the Supreme Court of Pennsylvania, and reported in 4 Brewster, 24 ; *City of Lowell v. Proprietors of Locks and Canals*, 104 Mass. 23, and to *Proprietors of Locks and Canals v. Lowell Horse Railroad Corp.*, 109 id. 224.

But while we thus maintain the liability of the commissioners to the appellant in this action, the canal company is by no means discharged from its obligation to maintain and repair this bridge ; nor are the commissioners left without remedy against the company. Upon the principles decided in many of the cases referred to, as also by the Supreme Court of the United States, in *City of Chicago v. Robbins*, 2 Black, 418, and 4 Wall. 657, they may have their remedy over against the company for whatever damages may be recovered against them in this action. So if they should expend money in necessary repairs, they can recover it back from the company in an action on the case. We need not suggest what other proceedings may be initiated by them, or by others for them, or in their interest to compel the performance of this duty by the company, further than to say, that should it persist in neglect to repair, and subject the commissioners to continued trouble and vexation it would do so at the risk of losing its charter.

It follows from what we have said that there was error in granting the appellees' first prayer, as well as in rejecting the fourth and

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eight instructions asked by the appellant. His fourth prayer on the question of liability accords with the views expressed in this opinion, and corresponds with the instruction approved in *Gibson's* case, whilst his eighth prayer correctly states the measure of damages. We deem it unnecessary to consider any of the other prayers of the appellant, as it is obvious from the case as now presented, the two we have approved will give him upon another trial all the law he requires. It also follows from the views we have expressed, that the testimony offered by the appellees in the first exception was inadmissible for the purpose of affecting their liability in this action.

Judgment reversed, and new trial awarded.

Judgment reversed.

OROMWELL V. ROYAL CANADIAN INSURANCE COMPANY.

(49 Md. 306.)

Contract — place of — foreign corporation.

A Canadian insurance company, having its home office at Montreal and a branch office at Baltimore, Maryland, insured a resident of Washington, D. C., against loss by fire. In the printed heading of the policy were the words, "Baltimore Branch." The policy purported to be dated at Baltimore, to be signed by two directors of the company, by attorney, and to bear the seal of the company. The names of the directors were engraved, and were followed by the words, "by their attorney, J. A. R., manager Baltimore Branch," and "not valid unless countersigned by the duly authorized agent of this company at Washington, D. C.," (signed) "B. F. S., agent." J. A. R. was general manager for the Baltimore Branch office, and of the district of the Southern States and the District of Columbia. The company had an agency at Washington, the agent there being appointed by J. A. R. subject to the right of rejection or removal by the company. B. F. S. was the agent of the company at Washington, and the policy was countersigned by him at Washington, and there delivered by him as the agent of the company to the insured. It was J. A. R.'s custom to sign policies as the general manager of the Baltimore Branch office, and send them in blank to the Washington and other local agents, who would fill them up, countersign and deliver them to the insured; and the policy in question was so signed by him as manager of the Baltimore Branch and sent in blank to the Washington agent. *Held*, that this was not a Maryland contract.

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ATTACHMENT. . The opinion states the case. The attachment was quashed below.

John Scott, Jr., for appellants. By the contract itself this is made a Baltimore contract. It issued from Baltimore. The insured makes his application, which goes to the general manager. The assent of the company, which brings the cause of action into existence, is given by the Baltimore manager. The commencement, origin and rise of the contract occurs there; it is agreed that the date shall be at Baltimore, and on that day goes into effect. It belongs to the Baltimore Branch in all essential respects. It is to be governed by Baltimore laws and there is every reason why Baltimore should be the place where the company should stand suit on such an instrument.

The authorities on this subject are in conflict. In none has the precise point to be determined here arisen. The Massachusetts cases are opposed to our views, but the court will find them sustained by the uniform current of the New York decisions. *Western v. Genesee Mut. Ins. Co.*, 2 Kern. 261; *Hyde v. Goodnow*, 3 Comst. 269, etc.; *Huntley v. Merrill*, 32 Barb. 627; *Cox v. United States*, 6 Pet. 203, etc.

Henry V. D. Johns, for appellee.

MILLER, J. The act of 1868 (ch. 471, § 211) provides that suits against foreign corporations exercising franchises in this State may be brought in any of the courts of this State, "by a resident of this State for any cause of action; and by a plaintiff not a resident of this State, when the cause of action has arisen, or the subject of the action shall be situated, in this State." In the case of *Myer v. Liverpool, London & Globe Ins. Co.*, 40 Md. 595, it was decided that to bring a case within the first clause of this provision the liability sought to be enforced must be a direct liability of the corporation to the resident plaintiff, and that a resident plaintiff in an attachment against a non-resident debtor cannot, under the second clause, subject the corporation to the process of garnishment in a Maryland court, to affect a debt due by the corporation to the non-resident debtor on a contract which is made, and the subject of which is situated in another State.

In the present case, the appellants, citizens of this State, having a claim against Patrick Foley, who resided in Washington city, in

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the District of Columbia, sued out of Baltimore City Court an attachment on warrant against him as a non-resident, and caused the same to be laid in the hands of the Royal Canadian Insurance Company as garnishee, a corporation created by the laws of Canada, exercising franchises in this State, and having a branch office in the city of Baltimore. The purpose of the appellants was to attach a debt due by the company to Foley for a loss by fire, on goods of the latter in a store in Washington, under a policy of insurance issued by the company. It is conceded the case in its facts is identical with that of Myer, in 40 Md. 595, unless this policy of insurance is to be considered and treated as a Maryland contract. Can it be so regarded? The printed heading of the instrument is—*“Baltimore Branch—THE ROYAL CANADIAN INSURANCE COMPANY—Capital, \$6,000,000—FIRE AND MARINE—Montreal.”* In the body of it the company, in the usual form, professes to insure “P. Foley, Esq., of Washington, D. C.,” to an amount not exceeding \$5,000 on his stock of goods kept for sale in a certain described store in Washington, for one year from the 4th of September, 1875, at noon, and concludes, “In witness whereof, we, two of the directors of the said company, by our attorney, have hereunto set our hands and have caused the common seal of said company to be hereunto affixed. *Dated at Baltimore*, this fourth day of September, 1875.” Here follows the engraved names of two directors, and below them: “By their attorney, J. A. RIGBY manager Baltimore Branch.” Below this is the following: “Not valid unless countersigned by the duly authorized agent of this company at Washington, D. C.,” and this is signed, “B. F. STEIGER, agent.” It might, perhaps, be inferred from the heading, the place of date, and the signing by the manager of the Baltimore branch, appearing on the face of this policy, that it was filled up, signed, and delivered in the city of Baltimore notwithstanding the assured is described as residing in Washington, and the property insured as located in that city. But this inference is repelled by the testimony in the record. It is proved that this Baltimore branch office was simply one of the agencies of this company whose home office was at Montreal; that Rigby was the general manager of the Baltimore branch office, and as such was the manager of the district for the Southern States including the District of Columbia; that the company had also a Washington agency at Washington; that Rigby appointed the per-

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son to act as agent for the company at Washington and notified the home office thereof, and the latter had the right to reject the person he so appointed for that agency, and the right at all times to remove such agent; that the Washington agent was the agent of the home company, though in some matters he would communicate with Rigby; that at the time this policy was issued Steiger was the agent of the company at Washington; that it was in fact countersigned by Steiger at Washington and there delivered by him as the agent of the company to Foley, who was then and has since continued to be a resident of that city; that it was Rigby's custom to sign policies as the general manager of the Baltimore branch office and send them in blank to the Washington and other local agents of the company, who would fill them up, countersign and deliver them to persons who from time to time insured in the company; that he would sometimes send as many as fifty of such blank policies to an agent of the company at a time, and that the policy in this case was so signed by him as manager of the Baltimore branch, and sent in blank to the Washington agent. This is all the testimony the record contains, but it shows very clearly that when this paper left the city of Baltimore it was an incomplete, unexecuted instrument: forming and evidencing a contract with no one; that it was completed, countersigned and delivered in Washington, where the assured resided and where the property insured was situated; and that in point of fact, the contract of insurance was there made with Foley by an agent duly authorized by the company to effect insurances in its behalf, and to fill up, countersign and deliver policies, embodying and evidencing such contract. In view of these facts it seems to us plain that this cannot be regarded as a Maryland contract. But it is said the authorities on this subject are in conflict, that the courts of Massachusetts have decided the question one way and those of New York another. Assuming this to be so, still the conclusion we have reached in this case is not in conflict with the decisions in either of these States. In the case of *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416, the insurance was effected upon property situated in Massachusetts by a New York company which had its office and principal place of business at Waterford, in that State. The policy purported to be dated at Waterford and there signed by the president and secretary of the company, but the negotiation was had by an agent of the company in Massachusetts, and by the terms of the instrument

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it was not to be valid unless countersigned by their agent at Worcester, and it was so countersigned and delivered by him, and the court, by SHAW, C. J., said, "there can be no doubt that this is a contract made in Massachusetts, and to be governed and construed by the laws of this State ; for though it was dated in New York, and signed by the president and secretary there, yet it took effect as a contract from the counter-signature and delivery of the policy in Massachusetts." This decision was followed by that of *Heebner v. Eagle Insurance Company of Cincinnati*, 10 Gray, 131, where the defendant corporation was a company created by the laws of Ohio and established at Cincinnati, but had an agent in Boston, duly authorized to make insurance contracts, who was furnished with blank policies signed by the officers of the company, in which it was declared that they should not take effect until countersigned by said agent, and the contract was made, and the policy filled up, signed and delivered in Boston. Upon these facts, the court said, "the contract of insurance was finally executed and delivered in this State. It was therefore a contract made here, and the law of this State is to govern its construction and interpretation without any reference to the domicile of the corporation liable upon it." This was followed by the case of *Thwing v. Great Western Ins. Co.*, 111 Mass. 109; s. c., 4 Am. Rep. 567, where the court held that as the policy was delivered and accepted and the premium note signed by the assured in Boston, the contract was therefore made in that State. In this last case it does not appear that the Boston agent of the foreign corporation had authority to make contracts of insurance or was intrusted with blank policies signed by the officers of the company with power to fill them up, and from what we can gather from the report of the case on this point, we assume he was not clothed with such authority. These are the Massachusetts cases, and according to them the contract in the case before us was undoubtedly made in the District of Columbia and not in Maryland. The first of the New York decisions on this subject is the case of *Hyde v. Goodnow*, 3 Comst. 266. The facts of that case are briefly these: a New York Mutual Insurance Company insured property in Ohio for a resident of that State, who made application for the insurance, through an agent of the company. This agent in Ohio received the application and the premium note signed by the applicant, forwarded them to the office of the company in New York, and the company, upon receiving the same, issued a policy from

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their office in that State and mailed it to the assured in Ohio. The court held that this was a contract made in the State of New York, but upon the express grounds stated in the opinion, that the Ohio agent was simply authorized to make surveys and receive applications for insurance, and had no power, nor did he assume, to do any thing that would bind the company; that the application which he forwarded was in no sense a contract until accepted by the company, but when they received and accepted it by consenting to insure, issued their policy and put it in the mail for transmission, from that moment it became a binding and irrevocable contract between the parties; and inasmuch as the acceptance of the application, the signing, issuing and mailing of the policy all took place in New York, it was a contract made in that State and not in Ohio. These were the grounds of that decision. In *Western v. Genesee Mutual Ins. Co.*, 2 Kern. 258, the same state of facts existed except that the policy, instead of being transmitted to the assured by mail, was sent to the company's agent to be delivered to him, which the court held did not alter the rule, and said: "When the application was received and approved by the company, and the policy executed and put in the course of transmission to the insured, the contract was complete, and both parties became bound; so that if a loss had occurred before its actual receipt by the insured the company would have been responsible. The contract was consummated by the final assent on the part of the company, and upon that event and not upon its delivery to the assured became operative. The validity of the contract is therefore to be determined by the law of New York. Here it was made and here it was to be performed." This case was followed by that of *Huntley v. Merrill*, 32 Barb. 656, where the facts were precisely the same as in *Hyde v. Goodnow*. The distinction between these New York cases and the one we are considering is plain and broad. In each of them the agent was an agent of limited authority having no power to issue policies or make contracts, or even to ratify or approve applications for insurance. He was not intrusted with blank policies signed by the officers of the company which he was authorized to fill up, countersign and deliver to parties with whom he might effect contracts of insurance, but in each case, the policy when it left the home office of the company was a filled up, completed and perfect instrument. In these essential particulars the exact reverse was the case with reference to the powers of the Washington

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agent of this company and the policy which he issued to Foley, and in holding it a contract made in Washington and not in Maryland, we decide nothing in conflict with what has been decided by the courts of New York. It follows that our decision in *Myer's* case is conclusive of this and the judgment must be affirmed unless the second proposition taken by the appellants' counsel is tenable, and that we now proceed to consider.

[Omitting this.]

Judgment affirmed.

SANTA CLARA MINING ASSOCIATION v. MEREDITH

(49 Md. 389.)

Corporation — right of director to recover for services.

A president or director of a corporation, rendering services to the corporation outside the scope of his official duty and not required thereby, may recover compensation therefor upon a promise implied from facts and circumstances.*

ACTION for services by a director of a corporation in procuring a patent, and in negotiating loans in various cities. The opinion states the case sufficiently. The plaintiff had judgment below.

Fielder C. Slingsluff, for appellant.

George G. Hooper and *Wm. Pinkney White*, for appellee.

GRASON, J. At the trial of this case in the Baltimore City Court the plaintiff offered three prayers, the two first of which were granted and the third was refused, and the defendant seven, all of which were rejected except the sixth, which was granted, and the judgment being in favor of the plaintiff, the defendant appealed.

The question presented by the prayers for our determination is, whether an officer of a corporation can recover for services rendered the corporation without an express contract of employment.

*To same effect, *Cheney v. Lafayette, etc., R. Co.* (68 Ill. 570), 17 Am. Rep. 584.

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We have carefully examined the authorities referred to by the counsel of the respective parties, and without in this opinion entering upon a review of them in detail, we deem it sufficient merely to state the principles of law which they establish. To entitle a president or director of a corporation to recover for services rendered his corporation, he must prove an express contract of employment, if the services for which he claims compensation are within the line and scope of his duties as president or director. To this effect are nearly all the cases cited in the briefs, and this general principle is admitted by the counsel of the appellee to be correct. But if a president or director of a corporation renders services to his corporation which are not within the scope of, and are not required of him by, his duties as president, or director, but are such as are properly to be performed by an agent, broker or attorney, he may recover compensation for such services upon an implied promise. See *Ang. & Ames on Corp.*, § 317; *Chandley v. Monmouth Bank*, 1 Green, 260; *Henry v. Rutland & Burlington R. R. Co.*, 27 Vt. 455; *Hall v. Vermont & Mass. R. R. Co.*, 28 id. 408; *New York & New Haven R. R. Co. v. Ketchum*, 27 Conn. 181; *Evans v. City of Trenton*, 4 Zab. 769.

Agency for a corporation is not required to be shown by a resolution of the board of directors or other written evidence, but it may be inferred from facts and circumstances. *Union Bank v. Ridgely*, 1 H. & G. 326; 1 Md. Ch. Dec. 398; *Elysville Man. Co. v. Okisko Co.*, 5 Md. 159; *N. C. Railway Co. v. Bastian*, 15 id. 501; *Bank of the United States v. Dandridge*, 12 Wheat. 69, 70, 83.

All the prayers of the appellant asked instructions that the plaintiff was not entitled to recover unless the jury should find an express contract of employment of the plaintiff by the defendant. We have shown that his employment as the agent of the defendant may be inferred from facts and circumstances, and the appellant's prayers were therefore properly rejected. There were facts and circumstances in evidence from which the jury were at liberty to infer that the appellee was employed by the appellant in respect of obtaining a patent for the lands in California, in obtaining the loan in London, and in procuring the surrender and cancellation of the first mortgage bonds of the company, the accomplishment of the latter being indispensable to the obtention of the loan. There is evidence in the record tending to prove that these services were either authorized by the corporation previously to their rendition,

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or were ratified by it after they were performed, and that they were such services as were not required of the appellee in the discharge of his duties as a director. All these matters were left to the finding of the jury by the instructions granted in the appellee's first and second prayers, and if found in his favor he was entitled to recover a reasonable compensation for his loss of time and for services rendered. These two prayers were therefore properly granted.

The verdict was for an amount *in solido*, and whether in view of the refusal of the court to grant the appellee's third prayer, and in the granting the appellant's sixth, it was for a larger sum than it ought to have been, this court cannot inquire. Finding no error in the rulings of court below, the judgment appealed from will be affirmed.

Judgment affirmed.

MARBURG V. COLE.

(49 Md. 402.)

Deed — marriage — tenancy by entirety

The rule that a conveyance to husband and wife constitutes them tenants by the entirety, the survivor taking the whole estate, is not changed by the abolition of joint tenancies, nor by the acts enabling married women to acquire and hold property separate from their husbands. (*See note, p. 269.*)

BILL for specific performance. The opinion states the point. The complainant had a decree below.

T. Alexander Seth, for appellants. The estate by entirety is based entirely on the common-law doctrine of the legal unity of husband and wife. During the last forty years, the unmistakable tendency of the legislatures and courts of the different States has been to break away from the old rule, and to recognize that division of person and property, which, practically and in reason, exists between husband and wife. Legislation in the different States has not been uniform on this subject, and the decisions of courts are very conflicting. We are therefore compelled to confine ourselves to our own acts of assembly, and the opinions of our own courts. The true logical conclusion to be deduced from these decisions and

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acts of assembly is, that the common-law doctrine of the unity of husband and wife is no longer tenable in this State. If this unity of husband and wife is destroyed, then the deed created in Ann Rebecca Cole and Abraham Cole a tenancy in common ; and Abraham Cole's interest descended, at his death, to his heirs-at-law, subject to his widow's dower right.

J. T. Mason, R., for appellee.

ALVEY, J. This is an application by the appellee to compel the appellants to specifically perform a contract of purchase of a house and lot of ground in the city of Baltimore. A *pro forma* decree was entered by consent against the appellants, from which they appeal.

The case is presented upon bill, answer and exhibits alone ; and the first and principal question is, what is the nature and character of the estate that was conveyed by the deed of the 10th of July, 1872, from Dallam, Marine and Perkins, to Ann Rebecca Cole and Abraham Cole, her husband ? Both in the granting clause and the *habendum* of the deed the property is declared to be to "the said Ann Rebecca Cole and Abraham Cole, her husband, their heirs and assigns, in fee." Abraham Cole has since died, and the appellants object to taking the estate under the contract with the appellee, upon the ground, among others, that the grantees in the deed just cited took distinct moieties, and that consequently, Ann Rebecca Cole can only convey the one moiety taken by her under the deed, and her dower interest in the other moiety ; while the contract with the appellants requires her to convey, by good and sufficient deed, the entire property and estate free from all incumbrances.

By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants, nor are they tenants in common. They are, in the contemplation of the common law, but one person, and hence they take, not by moieties, but the entirety. They are each seized of the entirety, and the survivor takes the whole. As stated by Blackstone, "husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, *per tout*, *et non per my* ; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of

the other, but the whole must remain to the survivor." 2 Bl. Com. 182. This has been the doctrine of the common law from an early period of its history, for we find the principle as stated by Blackstone laid down in Littleton's Tenures, § 291, from whence it has been almost literally transcribed by all subsequent writers on estates. Co. Litt. 187; 2 Cruise's Dig. 492; 1 Prest. Est. 131-2; 4 Kent's Com. 362; 1 Washb. Real Prop. (4th ed.) 672, and the authorities there cited.

Mr. Preston, in his work on "Estates," vol. 1, p. 132, has said that "where lands are granted to husband and wife as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties as other distinct individual persons would do." But even this proposition has been strongly controverted, and denied to be supported by authority. *Dias v. Glover*, 1 Hoff. Ch. 71; *Stuckey v. Keefe's Ex'rs*, 27 Penn. St. 397. It is not necessary, however, that we should decide that question in this case, as the deed does not in terms convey the estate to the grantees as tenants in common, but simply to them as husband and wife, and their heirs in fee.

Unless then this long-existing and firmly-established principle of the common law, whereby the husband and wife take seizin of the entirety, be changed or modified by statute, it is too clear for any question whatever, that the appellee, having survived her husband, has the entire and absolute estate in the property, and may sell and convey it as she may think proper. Has the common-law principle been changed by statute?

The Code, art. 49, § 12, being the codification of the act of 1822, ch. 162, provides that no instrument of conveyance shall be construed to create a joint tenancy, unless it is expressly provided that the property shall be held in joint tenancy. But, as we have seen, the estate conveyed to husband and wife in a deed like the one before us is not to them as joint tenants at the common law, and hence the statute just referred to does not affect or apply to such an estate as that conveyed to husband and wife. This has been expressly so held by this court, in the case of *Craft v. Wilcox*, 4 Gill, 504. Similar statutes to our own exist in a large number of the States of the Union, converting joint tenancies at the common law into tenancies in common, except where in the instrument it is otherwise expressly declared, and the invariable construction has been that they do not apply to or affect the peculiar estate taken

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by husband and wife, under a deed to them jointly. *Rogers v. Benson*, 5 Johns. Ch. 431; *Jackson v. Stevens*, 16 Johns. 110; *Shaw v. Hearsey*, 5 Mass. 521; *Brownson v. Hull*, 16 Vt. 309; *Thornton v. Thornton*, 3 Rand. 179; *Diver v. Diver*, 56 Penn. St. 106; 4 Kent Com. 362; 1 Bish. Law of Mar. Women, § 615, and cases there cited. Nor do the provisions of the Code, art. 45, §§ 1 and 2, authorizing a married woman to acquire and hold property as therein provided to her separate use, at all affect the nature of the estate conveyed to husband and wife by deed to them jointly. In reference to statutes of similar import in other States, the courts have expressly held that they do not in any manner affect the nature of the estate, which, according to the common law, the husband and wife take by a grant to them jointly; and these decisions are based upon principle and reasoning entirely satisfactory and conclusive. *Bates v. Seely*, 46 Penn. St. 248; *Diver v. Diver*, 56 id. 106; *Far. & Mer. Bk. of Rochester v. Gregory*, 49 Barb. 155; *McCurdy v. Canning*, 64 Penn. St. 39. It follows therefore that the common-law principle remains unaffected by statute.

[Omitting minor points, on one of which]

Decree reversed, and cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER.— To the same effect, *Hulett v. Inlow*, 57 Ind. 412; s. c., 26 Am. Rep. 64; and see note, p. 65. In *Meeker v. Wright*, 75 N. Y. 202, DANFORTH, J., said:

“ At the time of the execution of the deed from Clarissa Smith to Samuel Dally and Cordelia Dally, the statutes of 1848 and 1849, for the more effectual protection of the property of married women, and those of subsequent years, 1860–62, concerning the rights and liabilities of husband and wife, were in force.

“ By that of 1848, chapter 200, as amended in 1849, chapter 375, any married female may take by grant, etc., from any person other than her husband and hold to her sole and separate use real and personal property and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts. It was argued, however, that inasmuch as an unmarried woman ever could convey to her husband — she having none (*White v. Wager*, 25 N. Y. 333), or hold lands with him (*Goelt v. Gori*, 31 Barb. 314) and as this statute in terms clothed the wife with such capacity only as an unmarried woman had, therefore the married woman could neither convey to her husband or hold lands as tenant in common with him. But the act of 1860, chapter 20, entitled ‘ An act concerning the rights and liabilities of husband and wife,’ is not open to this criticism. Without adverting to other portions of it, it is enough to call attention to its enactment, ‘ that the property, both real and personal, which comes to any married woman by grant, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and shall not be subject to the control or interference of her husband or liable for his debts.’ Now the conveyance by Mrs. Smith was a grant to Cordelia Dally, and none the less so because Samuel Dally was co-grantee, and as we have seen, except for the marital relations between them, they would be, under the common law and statute, tenants in common. As such, she would be considered severally seized of her share; thus having a distinct freehold, wholly independent of Samuel Dally and in no privity with him, she could sell and

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convey her share. Either could compel the other to a partition, and each would be entitled to an account from the other for a due share of the rents and profits of the estate. There is here, then, a grant of property, with rents, issues and profits thereof, to a married woman. The common law gives to the co-grantee all the rents, issues and proceeds of the entire property, permits him to mortgage or even sell, to the entire exclusion of the other grantee during her life-time, and permits the same to be taken by his creditors to pay his debts — simply because this other grantee or co-tenant is a married woman and his wife — but the statute says, all this shall, notwithstanding her marriage, be and remain the sole and separate property of the married woman, and shall not be subject to the disposal of her husband or liable for his debts. The case is within the letter of the statute and within its spirit — it is not excepted from its provisions. The statute and the rule of the common law cannot stand together, and the latter must give way. It never stood upon truth or reason, but on a fiction. It ignored the civil existence of the wife and merged it with all her rights in that of her husband, and can be sustained, if at all, by only an idle and unprofitable refinement. Under the statutes the interests of the husband and wife in property are no longer identical, but separate and independent.

"In the case of *Matteson v. N. Y. Central Railroad Company*, 62 Barb. 373, Judge MULLIN, delivering the opinion of the General Term, says: 'The husband and the wife are for all legal purposes no longer one person.' And the construction which led to this general observation has been applied in so many cases that the conclusion arrived at in the case before us may be deemed well supported by authority.

"In *Power v. Lester*, 17 How. Pr. 413; s. c. on appeal, 23 N. Y. 539, the case disclosed a bond secured by mortgage upon certain real estate given by an unmarried man to a single woman. The parties afterward became husband and wife, and together executed a mortgage to one Lester, upon the same and other premises. In an action to foreclose the first mortgage the last mortgagee claimed (1) that the marriage of the plaintiff to the defendant extinguished the debt secured by the bond and mortgage, and (2) that the wife could not sue the husband on the bond and consequently could not maintain an action to foreclose the mortgage, but the trial court held that 'the statute (of 1848) virtually repeals the common-law rule.' 17 How. Pr. 415, 416. And this court in opinions delivered by Judges JAMES, COMSTOCK and DENIO, affirmed the judgment rendered by the Special Term — Judge JAMES saying: 'It was a general rule of the common law that when a man married a woman to whom he was indebted, the debt was thereby released, * * * because husband and wife make but one person in law, which unity of persons disabled the wife from suing the husband.' 'In this State, the Code and the acts of 1848 and 1849 have completely swept away the common-law rule which gave the husband rights in and control over the property of the wife.' Marriage no longer operates upon the property, but only upon the person. It will be seen that although the statute does not in terms abrogate the common-law rule referred to, yet the court held that it 'makes no distinction in favor of the husband,' and that there was nothing in the language of the statute or its general policy which would justify the discrimination suggested. The questions presented were very fully considered in the case cited, in the Supreme Court and in this court, and the conclusion reached in the case before us is only a little further on in the same road. Many recent decisions by this court are in the same spirit and to the same end, and seem to render a further discussion unnecessary. *Ballin v. Dillaye*, 87 N. Y. 35; *Bodine v. Killeen*, 53 id. 43; *Rowe v. Smith*, 45 id. 230; *Baum v. Mullen*, 47 id. 577; *Cashman v. Henry*, 73 id. 108; s. c., 31 Am. Rep. 437.

"The various cases cited by the learned counsel for the respondent, in support of the decision of the court below, have not been overlooked. Those earlier than the statutes referred to have no application if the rule of the common law has been changed by legislation. *Torrey v. Torrey*, 14 N. Y. 430, was, it is true, decided in 1856, and the effect of a conveyance to husband and wife was considered. The court reasserted the doctrine of the common law, holding that the grantees were seized, not as joint tenants or tenants in common, but of the entirety; both judges, however, who delivered opinions (HUBBARD, p. 133; DENIO, p. 432), were careful to state 'that the case is not influenced by the acts of 1848, 1849, for the protection of the property of married women, for the conveyance was made prior to the first of these acts.' The decision itself was rendered before the act of 1860, which I have cited. *Golet v. Gori*, 31 Barb. 313, was at Special Term and can hardly

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be considered as an authority upon the point now before us. The action was to charge husband and wife, lessees upon their covenant, to pay rent, and the learned court, without any discussion of the subject, dismissed the question by saying 'the acts of 1848 and 1849 are not intended to enable married women to take and hold property jointly with their husbands, but to take and hold and dispose of property as if they had no husbands.' This case was followed in *Farmers and Mechanics' Bank v. Gregory*, 49 Barb. 162, and accepted as authority without discussion. In 1871 the same question was presented in the case of *Müller v. Müller*, 9 Abb. Pr. (N. S.) 444, and the cases above cited were submitted to and followed as controlling the court at Special Term; but except for these decisions, it is plain the court would have held differently, for the learned judge says: 'I was inclined to the opinion that by these acts a married woman was enabled to take and hold real property or any interest or estate therein the same as if unmarried, which would include the right to take and hold under a deed to her and another person, and that other person might be her husband, and that she was by them released from all the common-law rules in regard thereto, and that under a deed to husband and wife by virtue of the statute, they would become tenants in common the same as other persons.'

"In *Beach v. Holkster*, 8 Hun, 512, the same question was before the court and very summarily disposed of by a divided court, the majority, by GILBERT, J., saying: 'These statutes operate only upon property which is exclusively the wife's, and were not intended to destroy the legal unity of husband and wife, or to change the rule of the common law governing the effect of conveyances to them jointly,' and citing the cases of *Goelet v. Gori*, *Farmers' Bank v. Gregory*, above referred to, and *Freeman v. Barber*, 3 T. & C. 574. This last case was decided by the Supreme Court of the Third Department, on the strength of *Goelet v. Gori*, and *F. & M. Nat. Bk v. Gregory*, the court saying: 'The question now raised must be considered *res adjudicata*.' It will be seen then that so far as authority goes it all rests upon the Special Term case of *Goelet v. Gori*. I have been able to find no reason for its support.

"If this view is correct, then by the deed from Clarissa Smith to Cordelia Daily and Samuel Daily, each became tenant in common with the other, and as such each had a valuable interest which could be conveyed, and therefore the deed from Samuel Daily to Cordelia Daily did convey an estate or interest of value, and supports as by a good and valuable consideration the mortgage, unless by the same rule of the common law the deed is wholly invalid by reason of the marital relation existing between the parties."

Two other judges concurred, but the case was decided on another point.

HILL V. HILL.

(49 Md. 450.)

Marriage — divorce — custody of child — testamentary guardian — access.

A decree of divorce gave the custody of the infant child of the parties to the father, subject to the mother's right of access in a specified manner. *Held*, that the father might appoint a testamentary guardian, but this could not cut off the mother's right of access, to be regulated by the court.

BILL to revive a decree in divorce and for custody of or access to infant child. The opinion states the case. The bill was dismissed below.

Matthew H. Carpenter, for appellant.

Bernard Carter, for appellee.

BARTOL, C. J. Upon the bill of complaint of the late Richard M. Hill against his wife, Catharine G. Hill, charging her with adultery, a decree was passed by the Circuit Court of Prince George's county on the 5th day of August, 1875, granting him a divorce, *a vinculo*, from his said wife. The decree directed "that the care, custody and control of Bessie Hill, the daughter of said complainant and defendant, an infant, be and is hereby committed to the complainant, Richard M. Hill, until the further order of the court in the premises, and that the defendant, Catharine G. Hill, be permitted by said complainant to have access to, and visit said Bessie Hill, her daughter, twice during each year, at such times as said defendant shall designate, and at such place or places as shall afford said defendant reasonable opportunity and facility for making such visits."

By an arrangement between the parents, it was agreed that the visits of the mother to the child should include the 17th day of July, the birthday of the child, and the Christmas holidays, in each year, and in pursuance of this arrangement the mother was permitted to have the child for two days about Christmas, in 1875, at a hotel in Springfield, Massachusetts, where her father, an officer in the army, was then stationed.

Richard M. Hill died on the 25th day of March, 1876, at Springfield, leaving his last will and testament, by which he devised and bequeathed all his estate and property to his daughter, Bessie Hill, and his sister, Ellen A. Hill, equally, and appointed his sister, Ellen A. Hill, the appellee, sole guardian of his daughter, Bessie Hill, who duly qualified as such guardian, and has ever since had charge and custody of said infant.

On the 10th of January, 1877, the appellant filed her bill of complaint in this case against the appellee, alleging the facts hereinbefore stated, and further alleging that the appellee was aware of the terms of the decree, and of the arrangement between the parties as to the times of visitation by the appellant, and that the appellee, notwithstanding the terms of the decree in that behalf, refuses to allow to the appellant all access to her child, and has

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informed the appellant of her intention to deny such access in the future.

The bill prays a revival of the proceedings and decree in the divorce case, and alternative relief as follows:

1st. That the appellant have custody of the child, and 2d, if that cannot be obtained, then that the provisions of the decree, securing her access to and right to visit with her child, may be enforced against the appellee, and for general relief.

The answer admits the material allegations of the bill and further admits "that the respondent has, through her counsel, informed the complainant that she will not allow her to have access to, or visit said Bessie, and that she means to adhere to this determination, unless she is compelled by the peremptory order of a court having proper jurisdiction in the premises to recede from it," and assigns her reasons for such refusal. The answer further denies the jurisdiction of the court to pass any of the orders and decree prayed for, and protests that if the court had such jurisdiction, all proper considerations forbid its exercise.

The cause was submitted upon the bill and answer, and certain affidavits filed by the appellant; and the present appeal is taken from the decree of the Circuit Court dismissing the bill.

It is contended on the part of the appellee that the appellant has no standing in court entitling her to maintain a bill of revivor.

On this question we entertain no doubt. Though she was a defendant in the cause and the decree was against her, it is evident she has rights and interests under the decree which entitle her to have the same reviewed. The terms and provisions of the decree above recited secured to her the most precious and important right and privilege of having access to, and visiting her child. This right being now denied can be secured to her and enforced only by a proceeding of this kind, whereby the decree in this respect may be executed in her favor.

In 2 Daniell's Ch. Pl. and Pr. 1617, the rule on this subject is thus stated, "Attempts have been made to limit the right of a defendant to revive to cases in which there has been a decree for an account, in support of which a *dictum* of Lord HARDWICKE in an anonymous case in *Atkyns* has been relied upon; but it seems to be now held, that it is not in cases of account only that a defendant can revive, but that he may do so whenever he has an interest." And in Story's Eq. Pl., § 372, the author, after referring to the

decision of Lord HARDWICKE, says: "But the principle has been, by subsequent decisions, extended to every case in which the defendant can derive a benefit from the further proceedings."

The right of the appellant to institute this suit being clear, we are next to consider the extent and nature of relief to which she is entitled.

And first, as to the custody of the child. By the decree the custody of the child was confided to the father, and he by his last will appointed his sister, the appellee, to be sole guardian of his daughter, expressing his trust that the guardian thus appointed "may be able in all things to fill a mother's part by her." There is nothing in the record to show that this trust is not faithfully performed, or any ground for supposing that the guardian is not, in all respects, a competent and suitable person to have the care and custody of the child. Had Mr. Hill the power to appoint a testamentary guardian?

The statute 12 Charles 2, ch. 24, which is in force in this State, confers upon the father the power of disposing by last will and testament of the custody and tuition of his minor child. Was the operation of this statute suspended, and the power of Mr. Hill to appoint a testamentary guardian for his daughter, taken away by the provisions of the Code, art. 16, § 26, and the exercise by the court of the jurisdiction thereby conferred? The Code provides that in all cases where a divorce is decreed, "the court shall have power to order and direct who shall have the guardianship and custody of the children."

The argument on the part of the appellant is, that the parents having been divorced by the decree, the child became the ward of the court, and the right of the father to appoint a guardian by last will no longer existed. We do not entertain this opinion. The act of 12 Charles 2 before referred to has the same force and effect as if it had been enacted by the legislature, it forms a part of the statute law of the State, and must be construed in connection with the subsequent legislation prescribing the powers of the court in cases of divorce to have and exercise supervision over the children of the separated parents, and to order and direct who shall have the custody and guardianship of them. It is very clear that cases may arise in which, by the exercise of this jurisdiction, the power of the father to appoint a testamentary guardian would be entirely suspended or taken away; as in the case where by the decree the custody of the

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children is given to the mother. In such a case it could not be maintained that the father would have the power by last will to appoint some other person guardian, and that the person so appointed would be entitled to the custody of the children, or could deprive the mother of their custody, and thus interfere with the jurisdiction of the court and defeat and annul its decree.

But in this case the court has directed that as between the parties litigant the father should have the care and custody of the child, "until the further order of the court," or in other words, placed the child in the custody of the party who is at the common law the guardian by nature. In such case we see no good reason why he had not the power to appoint a testamentary guardian, construing together the statute of Charles, and the provisions of the Code, as *in pari materia* they must both have operation and effect as far as practicable, and are consistent with each other.

In our judgment, the effect of the decree was not to take away the power of Mr. Hill, the father, to appoint a testamentary guardian; but while this power continued, it could be exercised only in subordination to the power and authority conferred on the court to supervise and direct who should have the guardianship and custody, and which was expressly reserved by the terms of the decree. The authority and rights of the testamentary guardian, as to the custody of the child, are held in subordination to the power of the court, in the same manner as they were held by Mr. Hill in his lifetime.

We do not, therefore, doubt or question the jurisdiction and power of the court to modify or change the previous order or decree in this respect, and in its discretion to change the custodian of the child, and place her in the care and custody of some other person. This power belongs to the court in the exercise of its jurisdiction under the article of the Code before referred to. It is unnecessary, however, to discuss this question further in the present case, because there is no good reason or cause shown to justify us in removing the child from the care and custody of the appellee, to whom she was confided by her late father, and who, as we have before said, appears to be in all respects a suitable person to have the care and custody of the child.

After the fullest and most careful consideration of the subject and of all the facts and circumstances of the case as disclosed in

the record, we do not think the child ought to be taken from the custody of the appellee and placed in that of the appellant.

Without entering at length into a statement of the reasons which control our judgment and discretion in this respect, we think the welfare of the child, which is the paramount consideration, will be best promoted by leaving her in the care of the appellee, and are of opinion the Circuit Court was right in refusing to grant the prayer of the bill in that respect. But we do not concur in the conclusion reached by the Circuit Court that the appellant ought to be denied all right of access to her child. This privilege was given to her by the original decree, passed by a court having before it all the facts as disclosed in the proceedings for divorce; nothing has since occurred, so far as appears in the record, to require or to justify any modification of the decree in this respect.

We do not think that any sufficient reasons are assigned in the appellee's answer for now refusing to the mother of the child the same privilege accorded to her by the original decree.

In determining this question, the main and paramount consideration is the happiness and welfare of the child, but in our judgment this will not be in any manner impaired or endangered by permitting her mother to have access to her, at suitable and convenient times and places, and under reasonable safeguards.

While the welfare of the child is certainly the primary object to be attained, and is not to be sacrificed or placed in jeopardy, in dealing with a question of this kind it seems to us there are other considerations not to be lost sight of. Some regard must be had for the tender relation which the appellant bears to her child. We cannot divest ourselves of the feelings of our common humanity, and ought not, if we could, wholly to disregard the natural claims upon our consideration of the mother's affection for her offspring.

In this case, whatever may have been her former transgression, there is no evidence in the record that she is leading a wicked or disreputable life; on the contrary, her associations are with respectable people. Her home is in the house of her father, Gen'l Ramsay, a highly esteemed citizen of Washington. She is a member of his family, which consists of her father, mother and two sisters, all worthy and estimable persons, occupying a high social position.

Under these circumstances it seems to us that the apprehensions on the part of the appellee, that her ward, now a child about eight

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years of age, could be in any manner injured, or her welfare and happiness endangered by allowing her mother access to her, are not well founded. These apprehensions doubtless have their origin in the affectionate interest the appellee feels for the child, but in our opinion they are not justified by any thing in the record. To the mother this is a privilege of the dearest and most precious kind, and we think would neither harm the child nor interfere with the just rights of the appellee, or tend to undermine or destroy her rightful authority and influence over her ward.

For the reasons stated, we are of the opinion there was error in the decree of the Circuit Court dismissing the bill. It ought to have been retained, and a decree passed reviving the decree of August 5, 1875, which has abated by the death of Richard M. Hill, and directing that the appellant have the same privilege of access to her daughter, Bessie Hill, which was secured to her by the original decree.

To that end the decree of the Circuit Court from which this appeal was taken will be reversed, and the cause remanded.

It is left to the judgment and discretion of the Circuit Court to prescribe in its decree, if it shall be deemed expedient, the times and places when and where such access shall be allowed. Of course it will be competent for the Circuit Court at any time hereafter, when from a change of circumstances, or from other cause, they shall consider it proper, in their discretion, to alter or modify their decree in this respect.

Decree reversed, and cause remanded.

Decree reversed.

NOLAN V. TRABER.

(49 Md. 400.)

Slander — words imputing to wife crime committed jointly with her husband.

An action of slander will lie for words imputing to a wife the commission of a felony jointly with her husband, but not in his presence.

SLANDER. Action by Nolan and wife, for the following words: "Those damned Irish people, the Nolans, set it on fire," meaning a certain stable; and "they have been waiting for a

favorable windy night to set it on fire." The defendant had judgment below.

R. Emmett Jones and W. Shepard Bryan, for appellants.

M. Starr Weil and Bernard Carter, for appellee. In order to sustain this action (no special damage being alleged), the words alleged to have been used must impute a crime to the plaintiff, Bridget, for which she could have been convicted and punished with corporal punishment. *Dorsey v. Whipps*, 8 Gill. 462; *Wagman v. Byers*, 17 Md. 184.

The language alleged in the declaration to have been used must be *prima facie* actionable; that is, it must naturally and *per se* impute to the plaintiff, Bridget, a crime for which she could have been convicted and punished with corporal punishment.

If the *prima facie* import of the language alleged to have been used does not impute a crime to the plaintiff, Bridget, for which she could have been convicted and punished, then, unless there is sufficient in the colloquium to change this *prima facie* import and to show that the language as used did impute such crime, the action cannot be maintained. *Jones v. Hungerford*, 4 G. & J. 402; *Wagman v. Byers*, 17 Md. 184; *Dorsey v. Whipps*, 8 Gill, 462.

The language charged in the first count (the other count is out of the case) did not, according to its *prima facie* import, as interpreted by the decisions just cited, impute to the plaintiff, Bridget, any crime for which she could have been convicted and punished with corporal punishment.

The charge, as alleged, was that the plaintiffs (husband and wife) had jointly, together, and as one act, set fire to the stable, in accordance with a preconceived concerted plan.

Now it is settled that if a wife act in company with her husband in the commission of any felony (other than treason or homicide), it is at least a *prima facie* presumption (and according to some authorities, a conclusive presumption), that she acted under his coercion, and consequently she cannot be convicted of any crime in so acting. 1 Greenl. Ev., § 28; 3 id., § 7, and notes; 1 Russell on Crimes, 33, 41; *Bash v. Sommer*, 20 Penn. St. 162.

Whatever is done in the company of the husband the law construes a coercion. 1 Russell on Crimes, 33.

Even if it be only a *prima facie* presumption that the wife who

acts with her husband does so by coercion, yet, as according to the authorities previously cited, the words charged must be *prima facie* actionable, that is, must naturally and *per se* impute a crime to the plaintiff, it follows, that as the plaintiff, Bridget, was only charged with acting jointly with her husband, and therefore in his company or presence, it was a charge which, so far from *prima facie* and *per se* imputing to her a crime for which she could be convicted, *prima facie* was one on which she could not be convicted.

BOWIE, J. This appeal involves the right of a wife to an action for slanderous words imputing to her a crime committed by her jointly with her husband. The common law, assuming that the free agency of a married woman is merged in the dominion of her husband, presumes that if a wife act in company with her husband in the commission of a felony, other than treason or homicide, she acts under his coercion and consequently without any guilty intent.

SIR WILLIAM BLACKSTONE said this doctrine was at least a thousand years old in England, being found among the laws of King Ina, the West Saxon.

Hence, words which charged the wife with crimes in the presence of her husband, or jointly with him, imputed no act for which she would be criminally liable, and therefore constituted no slander, and were not actionable according to the earlier authorities.

An eminent jurist in a recent work says, this presumption may now be rebutted by positive proof that the woman acted as a free agent; and in one case that was much discussed the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them. *Rex v. Stapleton*, 1 Jebb. C. C. 93; Taylor's Law of Ev. p. 191 (6th ed.).

The relation of husband and wife, however absolute in the past, no longer implies such subserviency of the latter as to make her the slave of her husband.

By gradual modifications of the common law, the wife has become in a great measure the peer of the husband in the control of her property and person, enjoying exemptions and privileges which raise her above all suspicion of moral constraint, except in rare instances. The legal status of the wife, although legally inferior in respect of the "*jus disponendi*" of some species of property, and subjection to marital rights, is yet so elevated as to protect her from all necessity of compliance with the husband's will in matters

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"*mala in se.*" The better opinion would seem to be that the presumption of coercion by the husband, in case of indictment or prosecutions against husband and wife jointly, is only *prima facie*, subject to be controlled by evidence that the wife intervened voluntarily and not by compulsion. *Rex v. Hughes*, 2 Lewin's C. C. 229; *Rex v. Pollard*, 8 C. & P. 553; *Rex v. Stapleton*, 1 Jebb. C. C. 63; 1 Greenl. Ev., § 26. note 5; 3 id., § 7.

The first count of the plaintiffs' *narr*, alleged that the defendant charged the appellant, Bridget Nolan, with an offense for which she was liable to be prosecuted and punished criminally, if found guilty. It does not charge that the act was done by the husband and wife in the presence of each other.

[Omitting minor points.]

Judgment reversed and new trial awarded.

Judgment reversed.

FRANKLIN COAL CO. V. MCMILLAN.

(49 Md. 549.)

Damages — measure of, in action for mining coal.

In an action of damages for mining and carrying coal, the measure of damages is the value of the coal when first severed from the bed, allowing nothing for the expense of digging; and if the trespass was not unintentional, exemplary damages may be added. (*See note, p. 282.*)

ACTION of trespass in the case. The opinion sufficiently states the point. The plaintiff had judgment below.

Arthur W. Machen and Orville Horwitz, for appellant.

S. A. Cox, William Walsh and Thomas J. McKaig, for appellees.

BARTOL, C. J. [omitting other points.] Upon the question of the measure of damages, a majority of the court think there was no error in the rulings of the Circuit Court, and that they ought to be affirmed.

The evidence in the case proves that the agents, while engaged in mining coal upon its own land, lying contiguous to that of the plaintiffs, extended their mining operations beyond the limits of its

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own land into that of the plaintiffs, and removed therefrom a quantity of coal, and this suit was brought to recover damages for the trespass. The form of action is in case, brought by parties entitled to the reversion in the land upon which the trespass was committed; but in our judgment, so far as the question arises in the present case, the rule regulating the measure of damages is the same as if the suit were in trespass by parties owning the fee, and entitled to the immediate possession.

No valid objection can be made to the granting of the eleventh and twelfth prayers of the plaintiffs, and we do not understand the appellants as complaining of them. They are identical with the instructions affirmed by this court in *Barton Coal Co. v. Cox*, 39 Md. 1; s. c., 17 Am. Rep. 525.

The objection relied on by the appellant is to the granting of the plaintiffs' thirteenth, and the refusal of the defendant's fifth prayer.

By the former the jury were instructed that the measure of damages was the value of the coal when first severed from its native bed, without deducting the expense of severing it. The defendant's fifth prayer asserts the proposition, that if the defendant mined out the coal from the plaintiffs' land, and in so doing believed itself to be the *bona fide* owner of the land and of the coal so mined then the measure of damages is the value of the coal in its native bed, before it was severed from the mine.

The question presented by these prayers is not a new one in this court, it was fully considered and decided, we think, in the case of *Barton Coal Co.*, before cited. There the court below granted the plaintiff's third prayer, identical with the thirteenth prayer in this case, and refused the second prayer of the defendant, which was in these words: "If the jury shall find, etc., that the defendant dug out and carried away the coal of the plaintiffs, without knowing that it was trespassing upon the property of the plaintiffs, and believing that it was its own coal, then the measure of damages for such digging and carrying away of coal is the value of the coal in the mine." The ruling of the Circuit Court upon these prayers was affirmed. After the decision was rendered, an application for a rehearing was made by appellant's counsel, in which they asked the court to reconsider its decision upon the question of damages; but the application was refused. In the opinion then filed, the decided cases were examined, and the question carefully considered, and the court

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adopted as the true rule that laid down in *Martin v. Porter, Morgan v. Powell* and *Wild v. Holt*.

We have examined all the cases which have been cited in the argument, and have discovered no sufficient reason for departing from the decision so recently made by this court ; nor have we seen any good reason to doubt that the rule then announced is upon the whole a sound and salutary one, which, while it awards no more than a just compensation to the party injured, will, as said by Baron PARKE, "tend to prevent trespasses of this kind."

We think no real distinction can be drawn between this case and that of the *Barton Coal Company*. There this court held the rule applicable, though the defendant was not a willful trespasser, but "dug the coal without knowing that it was trespassing upon the property of the plaintiffs, but believing it was its own coal."

It is said that in that case there was no dispute or question about boundaries, and that it was negligence in the defendant to go beyond its own lines. But the trespass was committed underground, where the lines were not easily ascertained. Trespasses on the land of another, if not willful, always imply some degree of negligence. In this case the defendant's excuse is, that it claimed to be the owner of the land. But it has been shown by the proof and by the verdict that its claim was not well founded. As said in *Maye v. Tappan*, 23 Cal. 306 : "Where a party has the means of ascertaining the dividing line, he is guilty of negligence in not ascertaining its location." In this respect, therefore, this case is not to be distinguished from that of the *Barton Coal Company*. Considering that case as decisive of the present, we have not thought it necessary to make further reference to the authorities, or to discuss the proposition there decided over again.

Finding no error in the ruling of the Circuit Court, the judgment will be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.— See to same effect, *McLean County Coal Company v. Lennon*, ante, p. 64, and note p. 63. The principal case was heard by four of the eight judges. ROBINSON, J., dissented as follows :

"The question of damages in actions of this kind was recently considered by this court in the *Barton Coal Company's* case, 89 Md. 1 ; s. c., 17 Am. Rep. 525, and it was held that the plaintiffs were entitled to recover the value of the coal when it first became a chattel, without deducting the cost of mining. Although I did not concur in that opinion, yet it is my duty to recognize it as the law of this State on the subject, and I do not propose to question in any manner the correctness of the rule thus laid down. On the contrary, I admit that unless this appeal is distinguishable on principle from the case relied on by the

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appellees, the decision therein rendered is conclusive of the question now under consideration.

"There, as in this case, the parties were owners of adjoining tracts, but the feature, and the broad feature, which distinguishes the two cases is that in the *Barton Coal* case, the defendant set up no title to the land from which the coal was taken. It was claimed that owing to the mountainous character of the country, and the difficulty in ascertaining the precise line separating the two tracts, the defendant had inadvertently trespassed upon the plaintiff's land, believing at the time he was mining on his own property. And accordingly the court was asked to instruct the jury that if they should find the defendant 'dug and carried away the coal of the plaintiffs without knowing that it was trespassing upon the property of the plaintiffs, and believing that it was its own coal, then the measure of damages to be recovered for such digging and carrying away of coal is the value of the coal in the mine.'

"The ruling of the Circuit Court in refusing this prayer was affirmed, and it was held under the decisions in *Martin v. Porter*, 5 M. & W. 551, and *Morgan v. Powell*, 8 Ad. & El. 281, and *Wild v. Holt*, 9 M. & W. 472, that although the trespass was inadvertently committed, the plaintiff was entitled to the value of the coal after it was mined. The question of damages for coal mined under a *bona fide* claim of title to the land did not arise, nor can it be said that it was considered, much less decided by the court. Nor did it arise in *Martin v. Porter*, *Morgan v. Powell*, or *Wild v. Holt*, decisions relied on in support of the rule adopted in the *Barton Coal* case. On the contrary, the question in each of these cases was the measure of damages to which the plaintiff was entitled for coal taken willfully or through the negligence of the defendant.

"When, however, the question did arise in *Wood v. Morewood*, 8 Ad. & El. (N. S.) 440, note, Baron PARKE told the jury 'that if they found for the plaintiff, they were to determine what damages should be given; that if there was fraud or negligence on the part of the defendant they might give as damages the value of the coals at the time they first became chattels, on the principle of *Martin v. Porter*, but if they thought the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief he had a right to do what he did, they must give the fair value of the coals, as if the coal field had been purchased from the plaintiff.' Thus we find that this distinguished judge, who decided *Martin v. Porter*, and who upon motion to set aside the verdict expressed himself pleased with the rule laid down in that case, expressly deciding that the rule did not apply where the coal was mined under a claim of title.

"And in the subsequent case of *Wild v. Holt*, we find the same judge interrupting Mr. Knowles in argument by saying 'that *Martin v. Porter* establishes as against a wrongdoer that no such abatement ought to be made, but the jury were at liberty to give as damages the full value of the coals when they first existed as chattels in consequence of the trespass. Where there is a real dispute the rule is different.'

"When the question again arose in *Hilton v. Wood*, L. R., 4 Eq. 432, Vice-Chancellor MALINS, referring to the decisions at law, says: 'It is clear upon the authorities a different principle is applicable when coal is taken inadvertently, or as in the present case under a *bona fide* belief of title, and when it is taken fraudulently with full knowledge that he is doing wrong, or in other words, committing robbery.'

"This case was followed by *Jegon v. Vivian*, L. R., 6 Ch. 760, in which *Martin v. Porter*, and *Morgan v. Powell* were referred to, and the rule recognized by these cases was strongly pressed in argument by Mr. Jessel, but Lord Chancellor HATHERLY said: 'It strikes me as a strong measure to give a man instead of the value of his coal the great advantage of having it worked without any expense for getting and hewing. It seems a rough and ready mode of doing justice, though the remark that a willful trespasser ought to be punished is worthy of observation, and further, as was said by one of the judges, when you deprive a man of his property in this way you deprive him of the management and control of his own property, and he might have made a better bargain. All that, however, is a matter of speculation, and it seems to me the judges have founded their decision upon the ground of willful trespass as in *Martin v. Porter*, where Baron PARKE expresses himself pleased with the rule. But the same learned baron, in *Wood v. Morewood*, held that where there was a *bona fide* claim of title the trespasser could be allowed for hewing as well as for other expenses,' and the lord chancellor adopted the rule laid down

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in *Wood v. Morewood*. We come now to the *United Merthy Collieries Company*, L. R. 15 Eq. 46, decided in 1872, the last case to be found in the English Reports on the subject, in which the rule in *Martin v. Porter* was again pressed, but Sir JAMES BACON said that although the trespass was fully proved, yet as there was no suggestion of fraud, it was a case for the application of the more lenient rule, and held that the defendant was liable only for the value of the coal, deducting the cost of its severance and carrying it to the pit's mouth.

"Such, then, is the unbroken array of English decisions beginning with *Wood v. Morewood*, and coming down to the *United Merthy Collieries* case, in which it has been uniformly held both at law and in equity, that the severe rule laid down in *Martin v. Porter* has no application where the coal is mined under a *bona fide* claim of title, and held, too, by the very same distinguished judge who decided *Martin v. Porter*. No case was cited in argument, nor have I been able to find one in England in which a contrary doctrine is held; and in this country, all the decisions are in accord with *Wood v. Morewood*, and against the contention of the appellees. *United States v. Morgan*, 3 McLean, 171; *Stockbridge Company*, 102 Mass. 80; 53 Penn. St. 261; *Foote v. Merrill*, 34 N. H. 490; s. c., 20 Am. Rep. 151; 23 Cal. 306.

"If we turn from the reported cases to the elementary writers on the subject, we find without a single exception they all recognize the broad distinction between a willful trespasser and a *bona fide* claimant. In *Mayne on Damages*, after referring to the rule in *Martin v. Porter*, the author says: 'It seems however that where there is a real dispute the case is different, and in such a case the minerals are to be valued as if the coal-bed in which they lay had been purchased from the plaintiff.' Addison on Torts, 300. 'In actions for trespass in taking away the plaintiff's coal, he is entitled to recover the value of the coal at the time of its severance, and the trespasser cannot claim any deduction therefrom, in respect of the expense incurred by him in getting the coal unless there is a real dispute of title * * * in which case the jury may give such an amount only as the plaintiff would have obtained from the defendant on a sale of the coal.'

"The distinction thus recognized is eminently just and proper, and one which lies at the foundation of all actions of trespass in which the elements of malice and bad faith are wanting. And although the rule in the *Barton Coal* case may be applied to a willful trespasser, or where coal is taken inadvertently, which in a legal sense may be construed as negligence, yet where it is mined in good faith under a claim of title, it does seem to me, with great deference to the opinion of the majority of the court, that there is no reason why the plaintiff should recover not only compensatory damages, but also the increased value of the coal, arising from the labor bestowed upon it in mining and preparing it for market. It is not pretended that the evidence was legally insufficient to prove that the coal was mined in perfect good faith under claim of title, and the court therefore erred, we think, in granting the plaintiff's thirteenth, and in refusing the defendant's fifth prayer."

The Illinois rule was reiterated in *Illinois and St. Louis R. and C. Co. v. Ogle*, 92 Ill. 353, 365. The court said:

"With respect to the rule adopted by this court for the assessment of damages in cases of this character, we still see no sufficient reason for changing it, even if it could be considered any longer an open question. We have read with much pleasure, and we trust some profit, the brief, and very able argument of the learned counsel for appellant on the question, and while we are not convinced by it, and decline to reconsider the cases decided by this court establishing the rule, or the authorities upon which they rest, yet we deem it proper to say that the more we have considered the rule and the reasons upon which it is founded, the more confident we are that it rests on sound legal principles and is suggested by a wise and just policy. The rule contended for by appellant and adopted by some other courts would certainly work a great hardship in many cases that might be supposed; and it would, under some circumstances, be a strong temptation to one who happened to have but little veneration for the laws of *meum et iuum*, to trespass upon the rights of others.

"It would, in many cases, we apprehend, be quite easy to pass the line into another's coal mine, as was done in this case, and trespass there for months, or possibly years, without the owner knowing any thing about it. The trespasser might speculate on the chances of never being detected, and at the same time console himself with the reflection that if dis-

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covered he might possibly escape through some loophole in legal proceedings, and if the worst came to worst, he would only have to pay what the coal was worth in the bank, and by pulling down the props and allowing the entries and rooms to tumble in, a scientific engineer might be able to make such estimates as would greatly reduce the actual amount of coal taken.

"Again one might have a coal field and not desire to have it mined for him just at the time it suited the convenience of his neighbor to do so. From certain temporary extrinsic causes the price might be very low, so that the owner would prefer keeping the coal till the market went up; yet perhaps its very cheapness might be a temptation to the trespasser to take it. It is believed that there are few if any instances with us where the owners of coal mines cross their own lines without knowing it; yet it might in some cases be difficult to prove that the taking was with a full knowledge of the owner's rights, and failing in that, all the owner could get under the rule contended for would be a half or a third of a cent a bushel.

"The rule which we have adopted will have a wholesome effect upon all persons operating coal mines. It will have a tendency to prevent willful trespasses on other persons' rights. To change the rule, and adopt the one proposed in its stead, would not only be unwise on the ground of public policy, but would directly mar the beauty and in part destroy the harmony, logic and consistency that exist in that great body of common-law principles and maxims that underlie and constitute a part of the jurisprudence of our State.

"The rule which we have adopted is not one of our own manufacture. It is founded on legal principles and maxims as old as the common law itself. Among them may be mentioned the following: A party shall not be permitted to take advantage of his own wrong; he cannot acquire title to a chattel by a mere tortious act; that so long as a chattel can be identified, however much its value may be increased by the labor of a wrong-doer, the right of property is unchanged, and the real owner may reclaim it or recover its full value from the wrongful taker. When a portion of the realty is by a trespass severed from land and is thereby converted into a chattel, if one other than the trespasser takes it it is admitted he is liable for its full value in its severed condition. So in trespass *quare clausum fregit*, the defendant is always liable for the full value of any chattel he may carry away at the time of the unlawful entry. And, finally, one cannot make himself the creditor of another without the latter's consent.

"Now it seems to us utterly impossible to harmonize these acknowledged principles of law with the rule contended for. Let us see; A unlawfully enters the coal mine of B, and deliberately separates from the coal in its unmined and natural state one hundred bushels of coal. The coal before separation is worth just fifty cents. When separated it is worth just five dollars. Now, when the coal is thus mined and ready for removal to market, to whom does it belong? All concede that it belongs to B, the owner of the mine. To say that A had any interest in it whatever would be to hold that one could, in violation of the principle above stated, acquire a right in another's chattel by his own tortious act, or in other words, could take advantage of his own wrong. Suppose when the coal is thus mined, C, a third party, in the absence of A, enters the mine and carries the hundred bushels of coal away without authority from B. In such case it is quite evident that A would have no right of action against C for taking the coal, and it is equally certain that B would have such right of action, and that he could recover five dollars, the full value of the coal. This but shows that A really has no interest in the coal notwithstanding he enhanced its value ten-fold by mining it. Now if C, in the case above supposed, is bound to pay five dollars as damages for the trespass, being the full value of the coal, and A, in the event he got away with it himself, would be required to pay only fifty cents for taking the same coal, upon what principle or reason would this difference in the measure of damages rest? Not on the form of action, for in either case we will suppose the action to be trespass *quare clausum fregit*. There is evidently no difference in the circumstances of the two cases, except that A incurred the expense of digging the coal, and C found it already dug for him. Now if A, in the assessment of damages, is required to pay only fifty cents, does he not in effect make B, the owner, pay him for his labor — his tortious act? Or, in other words, he makes himself B's creditor without the latter's consent.

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"If the owner bring trover for coal wrongfully taken from his mines, it is conceded that the measure of damages is the value of the coal in its state or condition as a chattel, without any deduction for mining; and in such case, where the trespasser has sold the coal and converted it into money, the owner of the mine may waive the tort and recover the full amount of money received for the coal in an action of assumpsit.

"If a wrong-doer enters the premises of another and takes his horse from the stable, on a count for unlawfully breaking the close of the plaintiff, setting up by way of aggravation of damages the unlawful taking of the horse, the owner may recover the full value of the horse, without any deductions on account of expenses incurred in removing locks from the stable or capturing the horse. These familiar principles are all in harmony with the rule we have adopted. They are not in harmony with the other."

SCOTT, J., dissented.

In *Clement v. Duffy*, Iowa Supreme Court, Oct. 21, 1880, 7 N. W. Rep. 85, it was held as follows: "It is urged by counsel for appellant that the court erred in deducting from the value of the grain the cost of threshing and marketing; and it is said that where a wrong-doer expends labor upon the property of another, he is not entitled to compensation therefor. But in this case it does not appear that the plaintiff knew, when he commenced the action and seized the grain, that it was the defendant's property. He may have acted in entire good faith, believing that he was the owner. We believe the rule should be limited to willful wrong-doers. Such seems to have been the opinion of the court in *Silbury v. McCinn*, 8 N. Y. 379. The cases where the question has arisen are mostly those where it has been claimed that the right of property may be lost by reason of the change of identity. See 2 Kent Com. 868. What is said in *Stuart v. Phelps*, 39 Iowa, 18, upon the subject, should, we think, be considered as applicable to a willful trespass. In our opinion the expense of threshing and marketing the grain was properly deducted from the market price. Grain is ordinarily held for sale on the market. In the stack it is of no value as an article of commerce; and the plaintiff did no more than what the defendant would have been required to do to realize the money upon it."

WILLIAMS V. WORTHINGTON.

(49 Md. 572.)

Will — precatory words — when creating trust.

A testator provided as follows: "It is my will and desire, and I hereby devise and bequeath all my property, real, personal and mixed, to my dear wife E. A., and her heirs and assigns forever, and it is my request and desire that my said wife E. A. should by last will and testament devise and bequeath all of said property at her death remaining in her possession to my friend B. W., and to E. W., their heirs and assigns forever, share and share alike." *Held*, that this did not create any trust, but that E. A.'s estate was absolute. (See note, p. 293.)

BILL to enforce a trust. The opinion states the case. The complainants had judgment below.

James Revell and William H. Tuck, for appellants.

Frank H. Stockett and Alex. B. Hagner, for appellees. The words

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used in the will are sufficiently clear and definite to create a trust, and are sufficiently imperative to demand its fulfillment.

In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding technical terms. Lewin on Trusts, 86, 104; Hill. on Trustees, 73-74; Jarman on Wills, 334 *et seq.*; 2 Story's Eq. Jur., §§ 1068, 1068a.; 1 Spence, 498; *id.* 501; 1 Redf. on Wills, 173, 174, 175, 699, 700, 703 and notes; Perry on Trusts, §§ 112, 114, note 3, 115; *Forbes v. Ball*, 3 Mer. 437; *Hunter v. Stenbridge*, 12 Ga. 192.

The correct principle is, that a trust is created in those cases only "where a testator points out the objects, the property, and the way it should go." Smith's Manual of Equity, 124; *Malin v. Keighley*, 2 Ves. Jr. 335; *Knight v. Boughton*, 11 Cl. & Fin. 548; *Pierson v. Garrett*, 2 Bro. Ch. 38; *Chase v. Plummer*, 17 Md. 166; *Saylor v. Plaine*, 31 *id.* 158; *Eade v. Eade*, 5 Mad. Ch. 77; *Horwood v. West*, 1 Sim. & Stu. 387; *Ford v. Fowler*, 3 Beav. 146; *Paul v. Compton*, 8 Ves. 380.

In the case now before the court, the will is so clear and expressive as to the objects and the way in which the testator's property should go, *i. e.*, the persons who are to take, that there can be no hesitancy as to either.

BARTOL, C. J. The bill of complaint in this case was filed by the appellees, claiming as devisees and legatees under the will of their late father Brice T. B. Worthington, for the purpose of enforcing an alleged trust, in favor of their testator, under the will of Dr. Asa Anderson, deceased.

The appellants, respondents below, who claim as executor, devisees and legatees under the will of Mrs. Eliza Anderson, deceased, demurred to the bill, and have appealed from the decision of the Circuit Court overruling the demurrer. The question presented by the appeal is the construction of Dr. Anderson's will, which contains the following clause, relied on as creating the trust: "It is my will and desire, and I hereby devise and bequeath all my property, real, personal and mixed, of what kind or nature soever, and wheresoever situated, to my dear wife Eliza Anderson, and her heirs and assigns forever, and it is my request and desire that my wife Eliza Anderson should, by last will and testament, devise and bequeath all of the said property at her death remaining in her possession, to my friend Brice T. B. Worthington of Annapolis, and to

Elizabeth Williams, daughter of Theodore Williams, of Prince George's county, to the said Brice T. B. Worthington and Elizabeth Williams, and their heirs and assigns forever, equally share and share alike."

With respect to the disposition of the property to be made by his wife, the testator does not use imperative language, but expresses his *wish* and *desire* merely.

It is not denied or questioned, however, by the appellants, that precatory words such as these may create a trust. They have been so construed in a great many decided cases which need not be particularly cited. These will be found collected in the elementary works. Perry on Trusts, § 112 *et seq.*; Lewin on Trusts, 104 *et seq.*; Hill. on Trustees, 108, etc.; and 2 Story's Eq. Jur., §§ 1068 to 1073.

"The effect of expressions of this nature in creating a trust depends entirely on the supposed intention of the donor (or testator) to be gathered from the tenor of the instrument." Hill. on Trustees, 114.

In *Chase v. Plummer*, 17 Md. 165, it was said: "It has been frequently decided, both in England and in this country, that words of recommendation, desire, hope and such like, will raise a trust to be executed by the persons to whom they are addressed. But such expressions are not always imperative; they are flexible in character, and whether they are to prevail in a particular case is always a question of construction upon the whole will."

It is not easy to extract from the decided cases any very clear or well-defined rule to govern us in the construction of the will under consideration; that must necessarily depend upon its particular provisions, and the intention of the testator to be derived from its terms.

It may be laid down, however, as well settled upon all the authorities, that in order to justify the court in construing precatory words in a will as creating a trust, it must appear that the property which is the subject of the trust is definite and certain.

In this case the will gives Mrs. Anderson the absolute estate in fee, and then requests and desires that she should at her death devise all the said property remaining in her possession to B. T. B. Worthington and E. Williams.

The trust is sought to be established, not with respect to all the property devised by Dr. Anderson to his widow, not with respect to any specific part thereof described in the will, but with respect

to so much thereof as might remain in her possession at her death. Now how can it be said that the subject of the supposed trust is certain and definite.

Having the absolute estate, Mrs. Anderson undoubtedly possessed the power of disposing of the property, according to her own discretion, unless by the terms of the will her discretion and power of disposition were fettered and controlled. If the precatory words had related to the whole of the property devised to her, there are many decided cases which hold that the words indicating the ultimate disposition which the testator desired her to make would charge the property with a trust in favor of the persons named, notwithstanding the gift to her was in fee. Such are the cases of *Mace v. Mallorn*, 21 L. J. Ch. 355; *Gully v. Cregoe*, 24 Beav. 185, and *Shovelton v. Shovelton*, 32 id. 143, cited by the appellees, and other cases might be referred to, to the same effect.

But in this case, it appears to us, the power of disposition by Mrs. Anderson, implied in the absolute gift of the property to her, cannot be said to be limited or controlled by the subsequent words, which have reference only to such property as might remain in her possession at the time of her death.

“Where there is a right in a donee to spend the subject of the gift, that is inconsistent with the nature of such a precatory trust to bequeath it over to any other person.” *Cowman v. Harrison*, 17 L. & Eq. 290.

In construing wills containing precatory words, a distinction has been drawn between cases where the gift to the first devisee is for life only, and those in which the gift is absolute, with superadded words. *Howarth v. Dewell*, 6 Jur. (N. S.) 1360.

We have found no well-considered case in which a trust of this kind has been supported, where the gift to the first devisee was absolute in its terms, followed by precatory words, indicating the disposition to be made of what might be left, or what might remain of the property, at the death of the first devisee.

In such case the attempt to establish the trust has failed, first, for the reason that such expressions in the will can properly be construed only as conferring on the first devisee unlimited discretion and power of disposition, and secondly, because in such case the subject of the supposed trust is altogether indefinite and uncertain.

Many cases are cited in Lewin on Trusts, 108. We refer to some of them that appear to be analogous to the present.

In *Bland v. Bland*, 2 Cox's Ch. Cas. 349 (decided in 1745), the devise was in fee, with the request "as to the said premises, or so much thereof as he (the devisee) shall stand seized of at the time of his death." Lord HARDWICKE decided that the previous devise in fee imported a power in the devisee to diminish the property. He said: "It was the same as if the testator had said I leave it to you to dispose of it as you think fit, but I will be glad if you will give so much as you can spare, so and so."

In *Wynne v. Hawkins*, 1 Bro. Ch. 179m (decided in 1782), the will, after leaving certain legacies, proceeded as follows: "And as I shall leave behind me, over and above the said legacies, only sufficient for a decent maintenance for my loving wife, Mary Wynne, by whose prudence and economy I have saved the greatest part of the fortune I shall die possessed of, not doubting but that she will dispose of what shall be left at her death to our two grand-children; all the rest and residue of my personal estate, goods, chattels, moneys in the stocks, plate, jewels, watches and household furniture, and whatever else I shall be possessed of at the time of my decease, I give and bequeath to my loving wife Mary, hereby constituting and appointing her sole executrix." A bill was filed by a surviving grand-child against the representatives of the wife, to enforce the supposed trust under the will. But the trust was not supported. The lord chancellor said in delivering his judgment, "If the intention is clear what was to be given, and to whom, I should think the words 'not doubting' would be strong enough. But where in point of context it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed, and where that does not appear the scale leans to the presumption that he meant to give the whole to the first taker."

In *Pushman v. Filliter*, 3 Ves. 7, the testator gave the residue, etc., of personal estate to his wife, "desiring her to provide for my daughter Anne out of the same, as long as she, my said wife, shall live, and at her decease, to dispose of what shall be left among my children, in such manner as she shall judge most proper." On a bill being filed by the children against the executor of the wife, it was decided that no trust was created by the will in their favor; that it was an absolute gift of the property to the wife, to be disposed of to any use she might think fit, subject only to a trust in favor of the testator's daughter Anne.

In *Wilson v. Major*, 11 Ves. 204, there was an absolute gift to the wife, "upon full trust and confidence that she would make proper distribution of what effects may be left in money, goods or otherwise, to his (testator's) children." It was held that the wife took the absolute estate, unfettered by a trust. This case was decided by Sir WM. GRANT, M. R., in 1805.

We refer also to *Cowman v. Harrison*, 17 L. & Eq. 290, before cited, and the language of Lord ELDON in *Tibbets v. Tibbets*, 19 Ves. 655.

These decisions rest upon the distinct proposition that where the gift to the devisee is absolute, precatory words, with regard to what is left at the death of the devisee, will not create a trust, because the property to which they refer, as the subject of the trust, is not certain and definite. Here the precatory words apply to the property that may remain in Mrs. Anderson's possession at the time of her death ; which in our judgment is an equivalent expression, and means the same, as if the will had used the words, "the property that may be left."

In support of the position that this is not such an uncertainty as defeats the trust, the counsel for the appellees rely upon the expression of Sir JOHN LEACH, V. C., in *Eade v. Eade*, 5 Mad. Ch. 118. There the precatory words were construed to refer to the remainder of the wife's property. The vice-chancellor said : "If the testator had requested his wife at her death to leave the remainder of his property to G. and W. E., there would have been a clear trust in their favor because the remainder of testator's property could have been ascertained." By reference to the will then under consideration it will be seen that if the expression, "the remainder of his property," had been used, the whole property of the testator would have been subject to the trust, after deducting therefrom £200, named in the will. That the expression of the vice-chancellor is not susceptible of the construction put upon it by the appellees' counsel, we think is evident, not only from the case itself, but also from the decision of the same vice-chancellor, rendered three years afterward in *Harwood v. West*, 1 Sim. & Stuart, 387. In that case he held that the words "what she should die possessed of under his will," were too uncertain ; but construing the other parts of the will, he said : "It was clear that the testator had in his view the whole property she should possess under his will, and that the expression was equivalent to a recommendation to give the whole property."

We do not think that the clause in the will manumitting such of the testator's negroes, in the possession of his wife at the time of her death, as shall prefer to go to Liberia, in any respect changes the construction of the other provisions of the will, or furnishes any support to the trust claimed by the appellees with respect to the other property.

It is evident from the face of the will, that the testator fully understood the difference between positive and peremptory language and mere precatory words. Accordingly in conferring manumission upon the negroes, he used the plain and positive terms "and I hereby manumit such negroes for that purpose."

The effect of this provision was to qualify the antecedent gift to the wife, and to give her a mere life estate in the negro slaves, without the power of selling or disposing of them. But with respect to the other property, according to our construction of the will, the testator intended to give the same to his wife absolutely, leaving the execution of his request entirely to her discretion. In construing provisions of this kind in a will, we agree with what was said by the lord chancellor in *Wynne v. Hawkins* before cited, "That it being doubtful what is the confidence which the testator has reposed, the scale leans to the presumption that he meant to give the whole to the first taker." We quote what has been said by Judge STORY as quite applicable here. "It will be agreed on all sides, that where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions, to excite and aid that discretion, but not absolutely to control it, there the language cannot and ought not to be held to create a trust. Now words of recommendation, and other words precatory in their nature, imply that very discretion, as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context. *Meredith v. Heneage*, 1 Sim. 542. Accordingly in more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they were designed to be used in a peremptory sense." 2 Story's Eq. Jur., § 1069.

Being of opinion that Mrs. Anderson was entitled to the absolute

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estate in all the property devised to her by her husband (except the negro slaves), and that she had the power to devise the same at her death according to her own judgment and discretion, the decree of the Circuit Court will be reversed, and the bill dismissed.

Decree reversed.

BOWIE, J., dissented.

NOTE BY THE REPORTER.—In *Foose v. Whitmore*, the New York Court of Appeals, Nov., 1880, construed the following provision in a will: "I do give and bequeath all my property, both real and personal, to my beloved wife, Mary, only requesting her at the close of her life to make such disposition of the same among my children and grandchildren as shall seem to her good." They held that the wife took the testator's estate in fee, and that the qualifying sentence would not be construed to create a trust. See *Anderson v. Hammond*, 2 Lea, 281; S. C., 31 Am. Rep. 612.

MERCHANTS AND MINERS' TRANSPORTATION COMPANY V. STORY.

(50 Md. 4.)

Warehouseman — reasonable care — evidence of custom.

On September 9, 1876, the plaintiff shipped from Boston to Baltimore, by defendants' steamer, boxes of books, under a bill of lading providing that freight must be removed from the wharf, at the place of discharge, during business hours on the day of discharge, or it was liable to be stored at the risk and expense of the owner; all merchandise at the owner's risk while on the wharf. The steamer arrived at Baltimore on the 12th of September, and the goods were on that day discharged, and put on the defendants' wharf, but not on the highest part. A notice was the same day mailed to the plaintiff, stating that the goods were ready for delivery and must be removed within twelve hours, or they would be stored at the plaintiff's risk and expense. The plaintiff did not receive this notice, and he did not call for his books until the 18th. On Sunday, the 17th, an unusually violent storm of rain and south-east wind occurred, and flooded the wharf. This was the first time the part of the wharf where these goods were stored had been submerged, although in a period of twenty years another part had been flooded, the water then rising to within a few inches of the part in question. The wharf was well covered, and ordinarily was secure for storage, and watchmen were employed night and day. Signs of a violent storm and rise of water were noticed before 8 o'clock of the morning in question; the water rose steadily all day until 2 P. M., and then suddenly rushed over the wharf. The watchman did all he could to remove the goods but was unable, owing to the rise of the water and the absence of assistance to save them. *Held*, that the defendant had not used due and reasonable care, and that evidence of its custom to store goods on the wharf was properly rejected.

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ACTION of damages for injury to goods. The opinion states the case. The plaintiff had judgment below.

William A. Fisher, for appellant, cited *Penn. & Del., etc., S. Nav. Co. v. Hungerford*, 6 G. & J. 297 ; *Ewalt v. Harding*, 16 Md. 170 ; 17 *Pittsburgh & Conn. R. R. v. Andrews*, 39 id. 342 ; s. c., 17 Am. Rep. 568.

C. A. E. Spamer and *Thomas J. Morris*, for appellee, cited *Edwards v. Baltimore Fire Insurance Co.*, 3 Gill, 188 ; *The Eddy*, 5 Wall. 495 ; *Richardson v. Goddard*, 23 How. 39 ; *Rawson v. Holland*, 59 N. Y. 615, 616, 619 ; s. c., 17 Am. Rep. 394 ; *Mitchell v. Lancashire, etc., R. Co.*, L. R., 10 Q. B. 256, 262 ; *Bourne v. Gatliffe*, 4 Bing. N. C. 314 ; 3 Man. & G. 643 ; id., 11 Cl. & F. 45 ; *Cairns v. Robins*, 8 M. & W. 258 ; *Redmond v. Liverpool Co.*, 46 N. Y. 583 ; s. c., 7 Am. Rep. 390 ; Story on Bailments, § 545 ; *Ostrander v. Brown*, 15 Johns. 43 ; *Boyle v. McLaughlin*, 4 H. & J. 300.

MILLER, J. The appellant, a Maryland corporation, engaged in carrying passengers and freight between Boston and Baltimore, was sued by the appellee, for damage to certain books which had been brought to the latter city in one of the company's steamships. The declaration charges that the defendant agreed to carry said goods from Boston to Baltimore, and safely keep them in Baltimore until it delivered them to the plaintiff, but did not so safely keep the same, but carelessly and negligently permitted said goods, while in its possession, to be greatly damaged and injured by water, when it might by reasonable and ordinary care and diligence have prevented such damage and injury. The defendant pleaded that it did not commit the wrong and injury alleged, and the case was tried before a jury upon issue joined on that plea.

The proof shows that the books packed in boxes were shipped at Boston, on the 9th of September, 1876, under a bill of lading, which stated that "freight carried by this company must be removed from the wharf at Boston and Baltimore, during business hours on the day of its discharge, or it is liable to be stored at the risk and expense of the owner ; all merchandise at the owner's risk while on the wharf."

The books arrived safely in Baltimore on the 12th of September, and were put on the company's wharf in the place set apart for Boston freight, where they remained until the 18th of that month.

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On the day of their arrival, the company addressed and mailed a letter to the plaintiff, giving him notice that the goods were ready for delivery, and stating that they "must be removed within twelve hours, or they will be stored at your risk and expense." The plaintiff did not receive this notice, and did not call for his books until Monday, the 18th of September, when he found them injured and damaged by water. This injury was occasioned by water flooding the wharf during a storm of rain and south-east wind of unusual violence, which occurred on Sunday, the 17th of September. The wharf was well covered, and was in other respects, save its proximity to the water, a safe and secure place for the storage of goods. As to the facts thus stated there is no dispute. There is, however, other evidence in the record which will be noticed presently. Upon all the evidence the court, in lieu of certain prayers offered by the plaintiff, instructed the jury that if they found "that the plaintiff delivered to the defendant in good order the goods mentioned in the testimony, to be transported for hire from Boston to Baltimore in one of the defendant's steamships, and to be there delivered to the plaintiff in like good order, upon the payment of said hire, and the defendant signed and delivered to the plaintiff the bill of lading offered in evidence, and did transport the said goods to Baltimore, and landed them in good order upon the said defendant's wharf in Baltimore, on the 12th of September, 1876, and thereupon addressed and mailed the notice to the plaintiff given in evidence, then at the end of the business day of the 12th of September, the relation of the defendant to the said goods as a common carrier ceased, and the said defendant held the same goods thereafter as a warehouseman, subject only to the liabilities which appertain to that relation; that as such warehouseman, the said defendant was bound to use reasonable care in storing said goods in a place of safety according to their kind, and then by practice of the same care keeping them from injury till called for by the plaintiff; that reasonable care in this connection means such care as a prudent man would give to the keeping of his own goods of like kind and under like circumstances; and if the jury shall find that the defendant did not exercise the care above defined, and that the goods were injured for the want of the same, then they will find their verdict for the plaintiff, and will give him such damages as they shall think he has sustained, and if they find that the defendant did

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exercise such care, then they will find their verdict for the defendant."

As to the law of this instruction, there can, we think, be no well founded objection. In our opinion it correctly interprets the contract between the parties, and correctly states the obligations which the law imposed upon the defendant after the goods had been transported. This, in fact, was not seriously controverted in argument by the appellant's counsel, but he insists that under the circumstances of the case, there was no negligence on the part of the appellant, and the court ought to have so instructed the jury. This question is not raised by an exception to the instruction under rules 4 and 5 (29 Md. 2), that there was no evidence from which the jury could find that the defendant did not exercise such reasonable care as the instruction defines, but it is argued that it is properly raised by the court's refusal to grant some of the defendant's prayers. Each of these prayers on the part of the defendant denies the right of recovery upon the finding by the jury of certain facts therein enumerated. To sustain a prayer of this character there must not only be proof to support its hypothesis, but the facts stated must of themselves constitute a complete bar to the action, notwithstanding the truth of all other facts in the cause and all inferences fairly deducible therefrom. Now the facts stated in these prayers (apart from the secure construction, covering and protection of the wharf, rendering it in that respect a fit and safe place for the storage of goods, and the employment of a careful and competent watchman to guard and protect the shed and its contents) are, that before this day no part of this shed or wharf had been submerged more than once during a period of about twenty years, and that the part of it where these goods were placed had never been submerged before, and that the submersion of the wharf and injury to these goods on that day were caused by an unusual, unexpected and extraordinary high tide, and that the watchman then in charge could not have prevented the injury with the means at his command, and that there was no place of more safety to which he could have removed the plaintiff's goods and the other goods on the wharf with the means at his command. But there is evidence in the record showing that at other times the water had risen within a few feet of the floor of the wharf, and on one occasion at least during a storm, accompanied by a south-east wind, three-fourths of the wharf was submerged, and a rise of a few

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inches more would have brought the water upon that part of it where the boxes containing these books were placed ; that though placed on the highest part of the wharf allotted for storage of Boston freight, they were not on the highest portion of the whole wharf, and that if they had been placed or removed to such highest place, it is doubtful whether they would have suffered any injury, and certainly it is just and fair to infer if they had been so placed or removed, they would not have been damaged to the extent they were by remaining in the place they were put upon being landed from the vessel. The natural and necessary effect of a strong south-east wind is to drive the water from the bay and river in and upon the city wharves in this locality, and when such wind is coincident with a flood-tide the rise of water is increased, and the danger of overflow is proportionate to the duration and violence of the storm. Of these natural consequences, as well as of the time of the tides, the agents of the company are presumed to have knowledge, and were bound to take notice. Again, according to the testimony of the watchman, who on that day took the place of the defendant's regular watchman, and was the sole person charged and intrusted with the care and custody of all the freight on this wharf during this stormy day, it appears that the wind was from the south-east, and it was raining when he went on duty before eight o'clock in the morning, and it commenced raining very heavily about noon, and he says " the tide was rising steadily all day, but it came with a rush about two o'clock, and the water came upon the wharf " and he commenced removing the goods from the lowest point up higher, and worked away until he was up to his knees in water when he was compelled to desist, and that there were no stevedores about or assistance to be had. It thus appears, that the danger did not come unannounced or in the night, but that there was timely notice given of its approach in the morning, and that the water was gradually rising while the storm was increasing in violence, and yet no assistance was procured nor any effort made to obtain it, and no watchfulness or judgment exercised as to the probable effect of the wind and tide, but the security and safety of all the freight on this wharf was left during the entire morning and day to the unaided exertions of one man. In view of these facts and reasonable inferences, we cannot say the court was in error in rejecting these prayers of the defendant, nor does it seem to us to be such an exceptional case as would have justified the court in saying

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there was no evidence of negligence, and in taking the case from the jury on that ground.

The rulings of the court upon the other instructions asked by the defendant, and in granting the plaintiff's sixth prayer, are so obviously correct as not to require further notice.

Judgment affirmed.

 SHORT V. BALTIMORE CITY PASSENGER RAILWAY COMPANY.

(50 Md. 73.)

Negligence — removal of snow by street railway company.

A street railway company having a franchise to operate its road on a city street has a right to remove the snow from its track and place it upon another part of the street, and if it exercises ordinary care and prudence in doing these acts it will not be held liable for injury done to adjoining property by reason of such snow obstructing the flow of water in the street.*

ACTION of damages for flooding premises. The opinion states the facts. The defendant had judgment below.

J. T. Mason, for appellant. If the acts complained of were done by the appellee, or by his agents or servants, in the course of their employment, they were unlawful invasions of the appellant's rights, and it matters not that they were done without negligence. *Lawson v. Price*, 45 Md. 135 ; *Scott v. Bay*, 3 id. 445 ; *Balto. & Pot. R. R. Co. v. Reaney*, 42 id. 130, etc. ; *Chapman v. Thames Mfg. Co.*, 13 Conn. 272 ; *Bonomi v. Backhouse*, E. B. & E. 652 ; Addison on Torts, 5. The act of the appellee in obstructing the street was unlawful, and as the loss has actually happened whilst its wrongful act was in force, it will not be allowed to apportion or qualify its own wrong. Conceding, for the argument, that the conformation of the ground or the severity of the storm might have damaged the appellant, this is not sufficient to discharge the appellee. To entitle it to exemption, it must show not only that the same loss might have happened, but that it *must* have happened if the act complained of had not been done. *Davis v. Garrett*, 6 Bing. 716 ; *Scott v. Shepherd*, 3 Wils. 403 ; *Vandenburgh v. Truax*, 4 Den. 464 ; *Powell*

*Compare *Simonton v. Loring*, 68 Me. 164 ; 28 Am. Rep. 29, and note, 32.

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v. *Salisbury*, 2 Y. & J. 391 ; *Balto. & Pot. R. R. Co. v. Reaney*, 42 Md. 138.

Arthur W. Maihen, for appellee. The class of cases relied on by the appellant's counsel—cases of injury resulting to a land-owner by an alteration of the natural condition of the adjacent soil, by its owner or occupier, and falling under the maxim, *sic utere tuo ut alienum non lædas*, have no application here. This is the case of the lawful use of the surface of a street, as a street, and the defendant was responsible only for the exercise of due care. *Mayor & C. C. v. Marriott*, 9 Md. 175, 176 ; *Flynn v. Canton*, 40 id. 419 ; *Tyson v. Co. Com'rs*, 28 id. 510 ; *Ann. & E. Ridge R. R. Co. v. Gantt*, 39 id. 143 ; *P. W. & B. R. R. Co. v. Constable*, 39 id. 159 ; *Sharp v. Powell*, L. R., 7 C. P. 253 ; 41 L. J., C. P. 95 ; *Rylands v. Fletcher*, L. R., 3 Eng. and Ir. App. 339, 340.

ROBINSON, J. The appellant is the owner of a house in the city of Baltimore, on Hoffman street, near its intersection with Gay ; and the appellee is the owner of a horse railway, running along the bed of Gay street, and across Hoffman. On the 6th January, 1877, there was a heavy fall of snow, and in clearing its track, it is alleged the appellee threw the snow off toward the curb, making a ridge or bank on Gay street, and across the mouth of Hoffman, thereby obstructing the natural flow of water at the intersection of the two streets. On the other hand, the appellee proved that the snow, which had been pushed off the track by the snow-plow, lay between the track and the gutter, and did not obstruct nor in any manner interfere with the natural flow of water from Hoffman street. On the night of the day in question, it rained very hard, and the appellant's house was flooded with water, and this suit is brought to recover damages for the injuries thereby sustained.

At the trial below, the appellant asked the court to instruct the jury, that if they should find the appellee obstructed the natural flow of water from Hoffman street, and that by reason of said obstruction the house of the appellant was flooded with water, he was entitled to recover damages for the injuries thereby sustained. This instruction the court granted, subject, however, to the following modification : " That if the jury should find the appellee exercised ordinary care in the management of its track on Gay street, and removal of the snow therefrom, and clearing out the gutter extending along Gay street at the side of its track, and that the damage

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suffered by the plaintiff was attributable either to the conformation of the ground and situation of his premises, or to a storm of such extraordinary severity that the usual drainage provided by the city would not carry the water off, then their verdict should be for the defendant." The appellant contends that he was entitled to the instruction as offered by him, and that the court erred in granting it with the qualification.

Assuming then that the snow thrown on the street by the appellee in clearing off its track obstructed the natural flow of water from the street; and that in consequence thereof the appellant's house was injured, the broad question is presented whether he is entitled to recover damages irrespective of the question of negligence on the part of the railway company?

As a general rule, it is conceded that every one must so use his own property and exercise the rights incident thereto in such a manner as not to injure the property of another. And it is equally true that the mere lawfulness of the act is not in itself a test in all cases of exemption from liability for injuries resulting therefrom to the property of others. But yet, there are certain rights incident to the dominion and ownership of property, in the exercise and enjoyment of which a person will not be liable for damages, although injury may be occasioned thereby to the property of another.

The books are full of cases of this kind and it is unnecessary to cite them here. The question then is, what is the true test in actions of this kind by which the exemption from liability is to be determined? We think it may be safely said, both on principle and on authority, that the true test is, whether, in the act complained of, the owner has used his property in a reasonable, usual and proper manner, taking care to avoid unnecessary injury to others.

This is the rule laid down by the House of Lords in the recent case of *Rylands v. Fletcher*, 3 Eng. and Ir. App. 330. There the defendant built a reservoir for the purpose of keeping and storing water, and the weight of the water broke through some old disused mining passages and works, and injured the mine of the plaintiff. The Court of Exchequer, BRAMWELL, B., dissenting, were of opinion that the plaintiff was not entitled to recover, but on appeal to the Exchequer Chamber, this judgment was reversed, and on appeal to the House of Lords the judgment of the Exchequer Cham-

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ber was affirmed. The lord chancellor said : " The defendants, treating them as the owners or occupiers of the close in which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used ; and if, in what I may term the natural user of that land, there had been any accumulation of water either on the surface of the ground or under ground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place." " On the other hand, if the defendants not stopping at the natural use of their close had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me, that which the defendants were doing, they were doing at their own peril."

The right of the plaintiffs to maintain their action was based entirely upon the ground that the defendants had used their land in an unusual, or in the language of the lord chancellor, in a " non-natural " manner, but the right to use it for any purpose for which it might, in the ordinary course of the enjoyment of land be used, was distinctly asserted.

Now in this case the appellee was entitled under its charter and the ordinances of the city of Baltimore, to the use of the bed of the street for the purposes of a horse railway, and if its track was obstructed by snow, it had beyond all question the right to remove it. And the only question is, whether in clearing its track and in throwing the snow on the bed of the street adjoining thereto, it can be said that the appellee was, under the circumstances, using the bed of the street in an unusual or unreasonable manner. We think not. The removal of the snow from its track being necessary in order to enable the company to use it for the public benefit and convenience, it was obliged either to throw it on the bed of the street or to haul it away, and no one will pretend that it was under any obligation to do the latter. It had no right of course to throw

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the snow in the gutter, and thereby obstruct the natural flow of water from the street, because in so doing the appellee would have been guilty of negligence. Nor are we to be understood as deciding that the railway company had the right to bank up the snow on Gay street, so as to necessarily obstruct the natural flow of water. On the contrary, it was obliged to exercise ordinary care and prudence, not only in removing the snow from its track, but also in throwing it on the street. And this question was distinctly left to the jury by the modification of the plaintiff's prayer.

[Omitting questions of fact.]

The several instructions granted by the court presented, we think, the law of the case fairly to the jury, and the judgment below must therefore be affirmed.

Judgment affirmed.

ALVEY, J., filed the following dissenting opinion: I cannot assent to the opinion that has been filed in this case. As I apprehend the principles applicable to the case, a very different result should be produced from that produced by the opinion of the majority of the court.

I think the prayer offered by the plaintiff should have been granted, without the qualification such as the Superior Court attached to it; and that there was error in granting the first prayer offered by the defendant.

Whether the defendant was guilty of negligence in displacing the snow from its railroad track was not at all, in my judgment, the material question in the case; but the material question was whether, by displacing the snow from the road track, the defendant had, as the natural and proximate consequence of that act, produced injury to the plaintiff.

It is true the defendant holds a franchise from the State, to maintain and operate a passenger railroad in the streets of the city, the full enjoyment of which no one disputes; but that franchise should be so used as to avoid injury to the property of the citizen as far as possible; and if by removing the snow from the road track and placing it as it did, injury was produced, as the natural and proximate consequence of the act, liability attached, without reference to the question whether the defendant was guilty of negligence in simply displacing the snow from the road track, and throwing it to the one side or the other. When it was once established that the injury complained of resulted from the disposition of the snow removed from the road track, and from no other cause, and that the injury would not have ensued but from the manner of disposing of the snow removed from the track, a cause of action was established upon which the plaintiff was entitled to maintain his action. This I take to be a plain proposition, and one that is well established both upon principle and authority. Indeed it is but the logical sequence of the fundamental maxim that every one shall so use his own property as not to injure that of another. The question whether the act of removing the snow from the track was in itself lawful is far from being the test of liability for the consequences of the act; for, as stated by Mr. Addison in his work on Torts, p. 9: "There are many cases in which an act is perfectly lawful in itself, and will continue to be so, until damage has been done to the property or person of another; but from the moment such damage arises the act becomes unlawful, and an action is maintainable for the injury." Here, while it is fully conceded that it was lawful for the defendant to clear its road track of the snow, it is clear, I think, that it may still be liable for the consequences resulting from the heaping the snow across the mouth of an intersecting street, so as to obstruct the ordinary drains of the street, and to cause the water to flow upon an adjoining property to the injury of its owner. If such disposition of the snow be not a nuisance I have altogether mistaken the definition of that offense as against private right.

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In 3 Bl. Com. 217, it is said, "if one erects a smelting-house for lead so near the land of another, that the vapour and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive. So also if my neighbor ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance." And so in this case, though the defendant had a right to remove the snow from its road track, it was incumbent upon it to have deposited the snow in some other place than it did, or to have avoided heaping the snow in a manner that would interfere with or obstruct the natural and ordinary drainage of the street; and its failure so to do rendered it liable for the consequences, upon the familiar principle that a party should always bear the natural consequences of his act, and not require them to be borne by another. It is therefore no answer for the defendant to say that it did not contemplate the injury to the plaintiff's property, and that it was guilty of no negligence in simply removing the snow from the road track; nor is it any answer to say that the freshet was more than an ordinary one; if it be true that the damage complained of would not have occurred but for the banking of the snow across the mouth of Hoffman street by the defendant's servants. The defendant was bound to contemplate and to guard against not only the ordinary accumulations of water, but the probable occurrence of more than the merely ordinary freshets; as such are frequent in the course of nature, and within human knowledge and experience. Indeed, upon the theory that the defendant can only be held liable for the consequences of its actual negligence, it was bound to take such precaution. *Bailey v. Mayor*, 2 Den. 433. But as I have said, negligence is not the gravamen of this action, nor the foundation of the plaintiff's right to recover. See case of *Shipley v. Fifty Associates*, 106 Mass. 194; s. c., 8 Am. Rep. 318.

In the case of *Rylands v. Fletcher*, L. R., 3 H. of L. 330, an action of a kindred nature to the present, and where the whole subject was most thoroughly considered, Lord CRANWORTH said that "in considering whether a defendant is liable for damages which the plaintiff may have sustained, the question, in general, is not whether the defendant has acted with due care, but whether his acts have occasioned the damage. This is all well explained in the case of *Lambert v. Bessey*, reported by Sir T. RAYMOND, and the doctrine is founded in good sense. For where one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic utere tuo ut non laedas alienum*." This I take to be an established principle, and one properly applicable to this case.

The distinction taken by Lord Chancellor CAIRNS, in the case just referred to, between a natural and a non-natural use of land, if it can be taken to mean any thing more than the difference between a reasonable use and an unreasonable use, with respect to the rights of others, is hardly a practicable test of the application of the maxim *sic utere tuo ut alienum non laedas*; and I do not find that it is at all supported by authority. On the contrary, the principle of the maxim is quite differently, and, as it would appear, more correctly explained by Mr. Justice BLACKBURN, in *Williams v. Groncott*, 4 B. & S. 195, where he says: "Looking to the general rule of law that a man is bound so to use his own property as not to injure his neighbor, it seems to me that where a party alters things from their normal condition so as to render them dangerous to already acquired rights, the law casts upon him the obligation of guarding the danger, in order that it shall not be injurious to those rights." Here, as I have said, it was not the simple fact of removing the snow from the road track that gave rise to the injury, but it was the banking the snow along the street that caused the water to flow upon the premises of the plaintiff, according to the hypothesis of his prayer; and assuming that to be the real cause of the injury, it resulted not from the normal but the changed or altered condition of the snow, and the failure of the defendant to guard against the possibility of the snow in that condition and in that place, producing injury to the adjoining property owners. And in such case, the result of the act is the test of liability; and I can perceive no more propriety in making that liability to depend upon a question of negligence to be passed upon by the jury, as to the manner of using the road track, or the removal of the snow therefrom, as put in the defendant's first prayer, than there would be in making the liability of a defendant in an

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ordinary action for an assault and battery, or trespass to land, to depend upon a question of negligence by the defendant in the commission of the wrong alleged.

That the defendant was clothed with franchises from the State can certainly make no manner of difference as to the question of its liability. Its franchises, whatever they may be, must be taken to be held in subordination to the prior rights of property of the citizen; and it cannot for a moment be tolerated that it can claim exemption from liability, under circumstances where an individual would incur liability in the use of his property, simply because of the fact that it holds and is in the enjoyment of franchises from the State; or that the principle of its responsibility is in any manner modified or changed by reason of such franchises. Being in the enjoyment of an extraordinary privilege, for its own profit, there is no principle that requires the rights and property of the citizen to be subordinated to it; and so it has been held by many decided cases, among which are the following: *Hay v. Cohoes Co.*, 2 N. Y. 159; *St. Peter v. Dennison*, 58 N. Y. 416; a. c., 17 Am. Rep. 258; *Wilson v. City of New Bedford*, 108 Mass. 251; a. c., 11 Am. Rep. 352. These cases, in principle, strongly support the views that I have stated in the foregoing opinion.

I think the judgment should be reversed and a new trial ordered.

 MAYOR, ETC., OF CUMBERLAND V. WILLISON.

(50 Md. 138.)

Municipal corporation — change of flow of surface water.

A municipal corporation, intrusted with the care of streets, in discharging that duty, and without negligence, increased the natural flow of surface water discharging into a certain mill-race, whereby the mill-owners sustained injury. *Held*, that no action was maintainable therefor.*

When the plaintiff's mill-race was filled by washings from a city's streets by means of hose attached to fire-plugs, under the unauthorized direction of the mayor, *held*, that the city was not responsible.

ACTION of damages for fouling mill-race. The opinion states the facts. The plaintiff had judgment below.

R. T. Semmes and H. W. Hoffman, for appellant.

William M. Price, for appellee.

MILLER, J. The appellee, the owner of a water-mill and appurtenances situated in the city of Cumberland, brought this action against the city on the 19th of September, 1876, to recover damages for injuries to his property, caused, as the declaration alleges, by the wrongful acts of the defendant. At the trial many points were

* To same effect, *Lynch v. Mayr* (76 N. Y. 60), 33 Am. Rep. 271.

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decided in favor of the defendant, which are not brought up for review by this appeal. A brief statement of some of the conceded facts of the case is essential to a clear understanding of the main question, which the appeal does require us to decide.

The water-power of the plaintiff's mill is supplied mainly from Will's creek. By a dam erected across that stream, and a short artificial cut through its left bank the water is turned and conducted into a natural channel or water-course, and thence flows in this channel to the mill, and thence on and through the same channel to the Chesapeake and Ohio canal. The natural channel, which is called "Dry Run," is thus made to form the whole of the tail-race, and a greater portion of the head-race of the mill. It also receives the surface drainage from the eastern side of Will's mountain beyond the city limits, and from all the hills and valleys on the north and east of the city, and is in fact the only natural outlet therefor. It passes through the city in a winding course for nearly a mile, and before the construction of the canal it extended to the Potomac river. When streets were first opened in that part of the city their drainage was discharged into this run or race. The mill in question was erected over and across this run in a central and built-up part of the city, but at what time does not appear. It may be safely assumed, however, that streets in that locality conducting drainage into the race were opened and paved in whole or in part for a much longer period than twenty years before 1868. One of these was Bedford street, which was paved as early as 1845, and which emptied its drainage into the race a short distance below the mill. Bedford road, which is a continuation of this street beyond the city limits, passes along the side of a hill, and the surface water flowing down this hill formerly passed over this road, and over adjacent vacant lots, now built upon, and thence made its way through a hollow, and then down Frederick street, reaching the race at a point more distant from the mill, and nearer to the canal or river. In 1868 an act of the legislature was passed authorizing an extension of the city limits, under which the Bedford road for about four hundred yards was subsequently graded and paved. By this improvement the surface water from the adjacent hill was intercepted and conducted down Bedford street, whereby a larger flow than formerly, of such water, was emptied into the race along that street, and in times of heavy rains a larger quantity of mud, sand and debris was thus carried into the race near to the mill, than

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before this improvement was made. The growth of the city, the building of houses, and the opening and extension of other streets, also contributed to the same result. The obstruction to the free flow of water through the race, resulting from these causes, is one of the grounds of this action. There is no evidence in the cause of any want of reasonable care and skill on the part of the city in making these improvements.

Upon this state of facts, the plaintiff asked two instructions to the jury, to the effect: 1st. That if they find from the evidence that the water-power of the plaintiff's mill has been injured by obstructions to the free flow of water through the race, caused by such acts of the defendant as carried into the race an amount of rubbish and debris, at points and in quantities beyond that which would be so carried by the natural drainage of the city and the adjacent country, then their verdict must be for the plaintiff, unless they find the defendant had a prescriptive right to obstruct the flow of water in the tail-race of the mill in the manner and to the extent of the obstructions now complained of. 2d. That if they find from the evidence that within twenty years prior to this suit the defendant diverted the water, rubbish or debris, or any considerable portion thereof, from the regular and natural channel, by which it flowed down the hollow and Frederick street, and thence into the race near Liberty street arch, and carried the same down the Bedford road and Bedford street, and emptied the same into the race at a point immediately below the mill, where it would more injuriously affect the free flow of water in the tail-race, whereby the plaintiff was damaged, then their verdict must be for the plaintiff, although they may find that the defendant had a prescriptive right to flow said water, rubbish and debris down the hollow and Frederick street, to the race at the Liberty street arch. The defendant on the other hand asked an instruction that if the jury shall believe from the evidence that the defendant in the proper execution of its powers under its charter for the paving, grading, repairing, draining, sewerage and extending of the streets, lanes and alleys of the city, so directed or changed the natural flow of the surface water, which usually found its way into the water-course or mill-race mentioned in the declaration, whereby a larger flow of such water was emptied through or along Bedford street than had formerly flowed through or along that line, and that from this cause

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injury resulted to the private property of the plaintiff, he cannot hold the defendant responsible for that injury; and that there is no evidence in the cause of any want of reasonable care and skill on the part of the defendant in the execution of said powers. The court granted the instructions asked by the plaintiff and rejected the one asked by the defendant, and it becomes our duty to determine whether there is error in this ruling.

How far municipal corporations are liable for consequential damages to private property resulting from the exercise of their corporate powers, or what will amount to the "taking of private property for public use" in the constitutional sense of these terms, has been the subject of much discussion and controversy. Certain general principles seem, however, to have been clearly settled by the current and weight of judicial authority. Thus it is well settled that such a corporation is not liable to an action for consequential damages to private property or persons (unless it be given by statute) where the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the legislature, and there has been no want of reasonable care or skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable. 2 Dill. on Mun. Corp., § 781. Upon this principle it has been decided by a great preponderance of authority that municipal corporations acting under authority conferred by the legislature to make and repair, or to grade, level and improve streets, if they exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, for consequential damages to his premises, even though in grading and levelling the street a portion of the adjoining lot in consequence of the removal of its natural support falls into the highway, and the same immunity exists if the street be embanked or raised so as to cut off, or render difficult, the access to the adjacent property, and this, too, although the grade of the street had been before established and the adjoining property owner had erected buildings or made improvements with reference to such grade. Property thus injured is not in the constitutional sense taken for public use. This doctrine was long since announced, after the most careful consideration, by courts of the highest authority, and by judges of great eminence and learning. *Collender v. Marsh*, 1 Pick. 418; *Radcliff's Executors v. Brooklyn*, 4 Comst. 195; *O'Connor v. Pittsburg*, 18 Penn. St. 187. It was

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also approved by the Supreme Court in the leading cases of *Goszler v. Georgetown*, 6 Wheat. 595, and *Smith v. Washington*, 20 How. 135. These authorities have been since followed and adopted by the decisions of almost every State of the Union where the question has arisen, and in fact to such an extent that even the citation of the cases has become burdensome and superfluous. It is true that the Supreme Court of Ohio, in a series of decisions, has adopted a different doctrine and extended the liability of municipal corporations in such cases beyond the limits assigned to it elsewhere. By these decisions such corporations are held liable for consequential injuries which result from the exercise of their lawful powers, upon the ground that if an act, though legal and lawfully executed, be done for the good of all to the injury of an individual, the injury should in justice and good morals be shared by all. But this doctrine has not only been rejected by the authorities to which we have referred, but the court which announced it admits it to be in direct conflict with the decisions both in England and America. *Crawford v. Village of Delaware*, 7 Ohio St. 459. So far, therefore, as injury to the private owner consists in leaving his property above or below the grade of a street, so as to cut off or render difficult the access thereto, and so far as its value or its convenient and comfortable enjoyment may be impaired in consequence of such grading or change thereof from time to time, the law seems to be well settled, and if the injury complained of in this case were of that character we should have no difficulty whatever in holding that the city was not responsible therefor.

But another species of injury may result to private property by the grading, paving and improving of streets. By improvements made and work done upon streets, adjacent private property may be overflowed by water or injured by its action. In cases of this kind there is more difficulty, and perhaps more reasonable ground of conflict of authority. A distinction, however, has been taken, which may be well founded and reasonable between the disturbance or diversion of natural living streams, flowing in channels within defined and actual banks, and surface water caused by rain or melting snow. In the former case it has been held by some authorities that under the general power to grade and improve streets or to construct beneficial public improvements, a municipal corporation cannot deprive the owners of their property rights in the water course, or injure them by badly constructed and insufficient cul-

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verts or passage-ways obstructing the free flow of the water, without being liable therefor. But as respects surface water, if the damage has resulted solely as a consequence of the proper execution of a legal power by the corporation, it falls within the general principle and there is no liability therefor, and hence it has been held that as the owner of property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street, so municipal authorities may exercise their powers in respect to the graduation, improvement and repair of streets without being liable for the consequential damages caused by surface water to adjacent property. 2 Dill. Mun. Corp., §§ 797, 798.

In examining the numerous authorities upon this subject, we have found frequent reference to the opinion of ARCHER, Ch. J., in the case of *Barron v. Mayor and City Council of Baltimore*, reported in 2 Am. Jur. 203. It has been very highly and deservedly commended, and it is strongly relied on in connection with the Ohio cases, by the Supreme Court of Illinois in the case of *Nevins v. City of Peoria*, 41 Ill. 502 (a case much pressed upon our attention by the appellee's counsel), as justifying an admitted departure from the current of decisions elsewhere. In the Jurist it is correctly reported as the opinion of the judge sitting at *nisi prius* in Baltimore county court, and in some of the references to it this fact is stated, but it is a little remarkable that we find no reference to the further fact that the rulings in the case, in support of which this opinion was delivered, were on appeal reversed by the Court of Appeals and a *procedendo* refused, though that fact is stated in the report of the case in 7 Pet. 243, when it was taken up to the Supreme Court. We have examined the record of the case in this court. The testimony in the bills of exception is quite voluminous, but the general features of the case are clearly enough stated in 7 Pet., and they are substantially these: The plaintiff was owner of an extensive and highly productive wharf in the eastern section of Baltimore, enjoying at the time of his purchase of it the deepest water in the harbor; the city, in the exercise of its corporate powers over the harbor, the paving of streets, and regulating grades for paving, and over the health of the city, diverted from their accustomed and natural course certain streams of water which flow from the range of hills bordering the city, partly by adopting new grades of streets, partly by the necessary

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results of paving, and partly by mounds, embankments and other artificial means which were purposely adopted to bend the course of the water to the wharf in question; these streams becoming very full and violent in rains, carried down with them from the hills and the soil over which they ran, large masses of sand and earth which they deposited along and widely in front of the plaintiff's wharf, and the consequence was that the water was rendered shallow and the wharf became of little or no value; this injury was inflicted under a series of ordinances between the years 1815 and 1821, was progressive, active and increasing at the institution of the suit in 1822; the plaintiff gave evidence tending to prove the original and natural course of the streams, the various works of the corporation from time to time to turn them in the direction of this wharf, and the serious consequences of these measures to his property; the defendants did not assert that they ever made or proffered any compensation for this injury, but justified under the authority they derived from the charter of the city, granted by the legislature, and under several acts of the legislature conferring powers on the corporation in regard to the grading and paving of streets, the regulation of the harbor and its waters, and to the health of the city. Referring now to the record in this court, we find that upon this state of facts the defendants asked two instructions:

1st. That in passing the several ordinances and resolutions offered in evidence by the plaintiff, the mayor and city council acted within the scope of the authority conferred on the corporation by the laws of the State, and therefore the plaintiff is not entitled to recover damages against the corporation in this action for the loss he may have sustained by the filling up of the water at his wharf, as stated in the testimony; first, because the corporation and its agents and servants, in making said alterations acted as public agents in discharge of a public duty imposed on them by law; second, because the corporation consists of the inhabitants of Baltimore city, and they are not liable for any injury done to the plaintiff by the acts of their servants and agents which were not commanded by the said corporation; third, because the river and the soil of the river being the property of the State, and the defendants being the agents of the State, clothed with discretionary powers with regard to the preservation of the navigation of the harbor, the defendants are not liable in this action for the consequences resulting from

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their acts as complained of in the declaration and stated in the evidence ; and fourth, because if any wrong has been done in filling up the cove, it is a public nuisance and the plaintiff upon the evidence above stated has not sustained such an injury as will entitle him to maintain an action.

2d. That in grading and paving the several streets, and damming and turning the water at the several places marked on the plat and stated in the evidence, the officers, servants and agents of the mayor and city council acted within the scope of their lawful authority, and if the jury find from the evidence that they acted *bona fide* and to the best of their judgment, then the present action cannot be maintained against the corporation for any injury done by their said officers or agents in manner aforesaid.

But the court (ARCHER, J.) refused to grant these instructions, and was of opinion and instructed the jury that the plaintiff will be entitled to a verdict, if they believe from the testimony that the plaintiff's property was injured by the washings occasioned by the diversion of the waters flowing into the western cove and turning them into the eastern cove, and only to damages proceeding from such a source, as the counsel for the plaintiff have admitted, that they are not entitled to and do not claim damages on account of that portion of the injury, which may have been sustained by the washings from such of the waters as would naturally have flowed there, notwithstanding by the grading and cutting down of Washington and other streets, the waters which naturally flowed into the eastern cove carried down more earth and sediment than before said grading and cutting they had been accustomed to do. Then, after directing the jury as to the mode of ascertaining the damages, the court further instructed them, that if they believe the plaintiff's property had been injured by the diversion of the waters from the western to the eastern cove, and that such diversion was neither malicious, negligent or careless, but was even beneficial to the general interests of the city, made with the best advice and with due circumspection, consulting the general prosperity of the city and its inhabitants, either for securing the health of the city or for preserving more effectually its navigation, still, notwithstanding the jury should believe these facts, the plaintiff is entitled to damages for the injury they shall find he may have sustained, inasmuch as this general improvement would in such case be made for the benefit and advantage of the inhabitants of Baltimore, and it would

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be unjust that the property of the plaintiff should be deteriorated and he (to the extent of such injury) be deprived of his property, without remuneration. To these rulings the defendants excepted, and this constitutes the first bill of exceptions. The same instructions of the court were reiterated in the second exception, and the third and fourth need not be stated as they contain nothing material to the question before us. The defendants, after motion in arrest, appealed from the judgment against them. The well-known ability of counsel on both sides (TANEY, Ch. J., then at the bar being the leading counsel for the city) warrants the inference that the cause was thoroughly argued in the Appellate Court. There was no formal opinion by the court, but the following memorandum of their judgment in the case, written by Judge DORSEY, is filed among the opinions delivered at that term: "We concur with the county court in overruling the motion to arrest the judgment for the reasons assigned, and also in their refusal of the appellants' prayers in their third and fourth bills of exception, but dissent from the opinions of the court below in the first and second bills of exception and therefore reverse their judgment. No *procedendo* to issue." We have stated this case thus at length from our own records not only because the judgment of the Court of Appeals therein does not appear in our State reports, but also to show that it is that judgment, and not the overruled opinion of Judge ARCHER, by which we must be guided in ascertaining what the law of Maryland on this question is. The absence of an opinion in so important a case stating the grounds of decision is of course to be regretted, but the record plainly shows that the doctrine subsequently followed and adopted by the Supreme Court of Ohio was clearly and forcibly presented by Judge ARCHER in his instructions to the jury, and that it was as clearly repudiated by the unanimous judgment of the Appellate Court. The refusal to grant a *procedendo* shows beyond question the court was of opinion that the plaintiff upon the facts contained in the record had no ground of action whatever. In all its circumstances it presents a much stronger case for sustaining the action than the one now before us. In fact the injury here complained of very closely resembles that for which the plaintiff's counsel in *Barron's* case admitted they could sustain no action. That decision is decisive of the present case unless we now overrule it, and that we are not disposed to do, supported as it

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appears to us to be by a great preponderance of authority elsewhere.

At this point we might well conclude our opinion upon this branch of the case, but deference to the able arguments of the appellee's counsel induces us to notice the most important cases upon which they have relied. As to those in Ohio we have already said all that is necessary. In *Nevins v. City of Peoria*, the facts stated in the court's opinion make a case in which the grading of a street for the purpose of improving its drainage, undertaken by the city, was badly and carelessly done, and never completed, in consequence whereof the plaintiff's house and grounds were flooded at every considerable rain with mud and water, and his property and business otherwise injured. Under that state of facts it seems to us the case might have been decided, and the opinion tested upon the well-settled principle that the negligent and careless performance of a lawful act, whereby injury results, gives rise to an action against a municipal corporation as well as against an individual. But Judge LAWRENCE, for whose learning and ability we have great respect, proceeds further in his opinion and adopts the opinion of Judge ARCHER and the Ohio decisions, and in this for the reasons already stated we cannot agree with him. The case of *City of Columbus v. Woolen Mills Co.*, 33 Ind. 435, was decided upon an act of the legislature, which provided that when the grade of a street has been once established, it shall not be changed without first assessing and tendering the damages occasioned by the change, and this was held to apply to damages to property outside as well as within the city limits. In this there is no conflict with the previous decisions in the same State, nor with the subsequent case of *City of Delphi v. Evans*, 36 Ind. 90; s. c., 10 Am. Rep. 12. The cases of *Stetson v. Faxon*, and *Thayer v. City of Boston*, 19 Pick. 147 and 511, turn upon a different point, and are instances of a different class of torts. The opinions in these cases contain no intimation of a purpose to overrule the well-considered judgment of PARKER, C. J., in the previous case of *Colender v. Marsh*. Whatever conflict there may be between the Wisconsin cases of *Alexander v. Milwaukee*, 16 Wis. 247, and *Pettigrew v. Evansville*, 25 id. 223; s. c., 2 Am. Rep. 50, or however difficult it may be to reconcile them, it seems to us that the subsequent case of *Hoyt v. City of Hudson*, 27 Wis. 656; s. c., 22 Am. Rep. 714, has placed the decisions of that State on this subject within the gen-

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eral current of authority. *Mayor, etc. v. Appold*, 42 Md. 442, was a case where the legislature had granted power to the city of Baltimore to acquire by purchase, or condemnation and payment of damages, the right to use any land, water or water-course it might deem expedient and necessary for the introduction of water into the city. After the main works had been constructed, the city by ordinance adopted a plan for an additional temporary supply, by bringing the water of the Gunpowder river through pipes to a point on Roland run, at which it was to empty into that stream, to the extent of ten millions of gallons per day, and thence flow with the stream into Lake Roland, the main reservoir. The court held that this was an unreasonable and unauthorized use of the stream, an invasion of the rights of the riparian owners, which must be acquired by purchase or condemnation under the law, before the city could so use it, and affirmed an order granting an injunction to prevent such threatened use without such purchase or condemnation. It does not appear to us that any thing said in that case has a material bearing upon the question now under consideration. In *Eaton v. Railroad Co.*, 51 N. H. 504; s. c., 12 Am. Rep. 147, a railroad company having the usual corporate powers, in constructing its road had cut through a natural ridge or barrier, which had protected the plaintiff's meadows from the effects of the floods and freshets of a neighboring river, in consequence of which the water by flowing through this cut carried sand, gravel and stones upon their land, and the court held that this was a taking of private property within the meaning of the constitutional prohibition. But assuming (without expressing an opinion to that effect) that an injury of this character, inflicted in the mode and to the extent described in that case, would amount to such taking, still that would not affect our decision of the present case, because as the question is presented to us, and so far as the record discloses, the injury here complained of, besides proceeding from a very different cause, does not appear to have gone to such an extent. The point of the decision of the Supreme Court in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, is that the overflowing of land by backing water upon it, by means of dams, is a taking within the constitutional provision. The court expresses the opinion that the decisions which have exempted municipal and other corporations from liability for consequential damages to private property have gone to the uttermost limit of sound judicial construction, and in some cases beyond it, and they insist

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“ that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.” They concede, however, that this principle of exemption sustained by the authorities of the State courts “ is a sound one in its proper application to many injuries to property so originating.” This concession is quite sufficient to cover the present case, for there is nothing in the record to show that the increased washings into this race resulting from the extension of Bedford street, and other improvements in that locality, could not have been removed by a very slight expenditure of labor and money. In fact, the testimony offered by the plaintiff shows that he usually cleaned the race twice a year, but did not clean it within the past year, and that only one of his mills has been running since the 1st of March, 1876, because the race was filled by the washings of the street by means of hose attached to fire-plugs, done under the direction of the then mayor of the city, and that before that time the city authorities had caused the streets to be regularly scraped, and the dirt therefrom carted away. From this the inference is plain, that the stoppage of the mill was occasioned by this washing of the streets, which the court below very properly held to be an unauthorized act of the mayor, for which the city was not responsible, and not by the increased washing or flow of surface water, caused by the extension and improvement of Bedford street.

It follows from what we have said that, in our opinion, there was error in the court's action upon the instructions we have been considering, and for this error the judgment must be reversed.

Another question is presented by the rejection of the defendant's tenth prayer. By the act of 1864, ch. 121, the city of Cumberland was vested with the power to introduce water therein, and to pass ordinances regulating the introduction and use of the same. Under this authority works were constructed by which water from the Potomac river was forced and carried into the city on the east side of Will's creek to the extent of about one million gallons per day. According to the testimony on the part of the plaintiff this water is very largely used for water-closets and washing the pave-

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ments of the streets, and a portion of it so used is carried by the gutters and sewers mixed with the dirt and filth of the streets into this race, to the damage of the plaintiff. The defendant's tenth prayer is to the effect that the city has at all times the right to use or authorize its citizens to use its hydrants in washing its streets, even though mud is washed thereby into this natural water-course or mill-race. We have not been furnished with any ordinance passed in pursuance of the power to regulate the use of this water, so that the court could determine whether it was reasonable, or so unreasonable as to be a plain abuse of the power and therefore void. All that we can say is that an ordinance permitting the citizens to use the water for household and domestic purposes, and also to sprinkle the pavements and streets in front of their houses, as is usually done in cities in warm and dry weather, would be a proper exercise of the power, and for any injury resulting from such use of it (if any could possibly so result) the city would not be responsible. But the broad terms in which the instruction asked for is couched might justify an abuse of the power, and we are of opinion the court committed no error in rejecting it.

The result is that the judgment must be reversed, and as the case seems to us to be one in which a *procedendo* should not issue unless upon special application, it will not be issued until applied for.

Judgment reversed.

NOTE BY THE REPORTER.—ALVEY, J., filed the following opinion: In this case I concur in the conclusion that the judgment appealed from should be reversed, and I do not see that there is any such state of facts disclosed by the record as will entitle the plaintiff to maintain his suit. But there are several propositions maintained in the opinion of this court to which I cannot assent. For instance, the leading proposition, that a municipal corporation is not liable to an action for consequential damages to private property or persons, where the act complained of is done by it under authority conferred by a valid act of the legislature, if there be no negligence in doing the act, although the same act if done without legislative sanction would be actionable. With all due respect, I do not think that such proposition can be maintained either upon principle or any binding authority. While an act of the legislature may be perfectly valid simply as an authority for doing acts of a certain character generally, it does not necessarily follow that particular individuals should be made to suffer all the consequences that may result from doing any particular act of the denomination authorized by the statute. A statute may authorize the making of grades and drains for the benefit and improvement of the town, and to that extent be perfectly valid, yet if, by making a particular grade or drain, the private property of an individual is flooded and rendered useless, or is thereby seriously injured, the silence of the statute upon the subject can offer no reason why he should not be compensated. In such case, it is not to be presumed that the legislature intended that the statute should be made to operate to the detriment, it may be to the ruin, of the citizen. The power delegated should be exercised with due respect to the rights of private property (*Perry v. Wilson*, 7 Mass. 393; *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162); and if the municipal corporation invades those rights, though it be acting

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under a general power derived from the legislature, it should be made to respond in damages in like manner and to the same extent that an individual would be liable for a similar injury : that is to say, for the actual damage sustained.

Without going into any particular statement of the doctrine upon the subject, I only propose to say, that, in my opinion, the true principle, with its proper limitations, with respect to the liability of municipal corporations for wrongs of the character of that complained of in this instance, is that laid down and maintained in the cases of *Proprietors of Locks v. Lowell* 7 Gray, 223 ; *Haskell v. New Bedford*, 108 Mass. 208 ; *Brayton v. City of Fall River*, 113 id. 218 ; s. c., 18 Am. Rep. 470 ; *Franklin Wharf Co. v. Portland*, 67 Me. 46 ; s. c., 24 Am. Rep. 1 ; *Ashley v. City of Port Huron*, 35 Mich. 296 ; s. c., 34 Am. Rep. 652 ; *Pettigrew v. Village of Evansville*, 25 Wis. 223 ; s. c., 3 Am. Rep. 50. See, also, *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, and *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

STIGERS V. BRENT.

(50 Md. 214.)

Insanity — action against lunatic.

A lunatic may be sued at law and judgment may proceed against him upon a debt contracted while he was of sound mind, and equity will not interfere.*

BILL to set aside a judgment. The opinion states the case. The bill was dismissed below.

George W. Smith, Jr., for appellants. The acts of lunatics and infants are analogous. *Key v. Davis*, 1 Md. 43 ; *Chew v. Bank of Balto.*, 14 id. 319. Powers of attorney of infants to confess judgments are absolutely void. *Saunders v. Marr*, 1 Bl. 75 ; *Bennett v. Davis*, 6 Cow. 393. The power of attorney of a lunatic is absolutely void. *Dexter v. Hall*, 15 Wall. 26. The deed of a lunatic is absolutely void. *Van Deusen v. Sweet*, 51 N. Y. 381. And so with a mortgage executed by a lunatic. *Jacobs v. Richards*, 5 DeG. M. & G. 55 ; 18 Beav. 300 ; *Eckstein*, 1 Pars. Sel. Eq. Cas. 59. A lunatic is civilly dead. 5 Bush, 686 ; *Eckstein's case*, *supra*.

Edward Stake, for appellees.

BRENT, J. The bill in this case is filed by the appellants, as creditors of a certain John J. Brosius, to set aside a judgment rendered against him in favor of the appellee, George Brent, on the

*See *Garnett v. Garnett* (114 Mass. 179), 19 Am. Rep. 309, and note, 371.

12th day of February, 1877, by the Circuit Court for Washington county.

The cause of action was two promissory notes given by John J. Brosius to the appellee for money loaned, the one, dated July 1st, 1874, being for \$2,000 payable two years after date, and the other, dated November 1st, 1874, being for \$1,000, payable twenty months after date. Shortly after the maturity of both notes suit was brought upon them to the November term, 1876, of the Circuit Court for Washington county, and judgment obtained at the following term, which commenced in February, 1877.

On the 23d of the same month of February, and eleven days after the rendition of this judgment, Clarence Brosius filed a petition on the equity side of the court for a writ *de lunatico inquirendo* against the said John J. Brosius. The writ was issued, and an inquisition taken under it and returned on the 10th of March following, the jury finding that Brosius was then a lunatic, without lucid intervals, and had been so since the 1st of August, 1875.

A large amount of testimony has been taken in the case, and the soundness of Brosius' mind at the times he borrowed the two sums of money mentioned from the appellee and executed these notes, has not been questioned or doubted. The good faith and fairness of this transaction is conceded on all sides.

Nor can it be questioned that he afterward became of unsound mind, and was so at the time the suit of the appellee was brought, and the judgment in question obtained. The proof establishes these facts very conclusively.

The bill does not charge any actual fraud, collusion or conspiracy, but alleges that the judgment was improperly obtained, and unless it is declared void by the court in the exercise of its equity powers, the appellee will have a preference in the distribution of the estate of Brosius, and a fraud in law will thereby be committed upon the rights of the complainants as creditors.

Three objections have been urged against the validity of this judgment. The first, that a judgment cannot be rendered against a lunatic; the second, that no summons was served, and the third, that the attorneys who appeared in the case and confessed the judgment had no sufficient authority to do so.

In this case no question arises upon the fairness or validity of the notes, which are the foundation of the judgment. Their consideration was for money loaned, and they were signed and deliv-

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ered by Brosius a considerable time before his mind became impaired from business troubles and lunacy supervened. The naked point is presented whether a lunatic can be sued at law for a debt which he contracted when of sound mind, and a judgment therefor obtained against him.

Upon this point all the authorities agree, unless where some statute intervenes to prohibit it. In this State no such statute exists.

In the case of *Tomlinson's Lessee v. Devore*, 1 Gill, 345, this question seems to have been for the first time presented for the decision of this court. It was there contended that a court of law had no jurisdiction to render a judgment against a lunatic, and that the exclusive control over his person and property had been given to the Court of Chancery by the act of 1875, chapter 72, now embodied in the Code, article 16, under the sub-title "*Non compos mentis*." The case of *Brasher v. Cortland*, 2 Johns. Cas. 403, was relied upon as authority, but the court in its opinion shows that the decision of Chancellor KENT in that case was made under the peculiar provisions of a statute of New York, which were not to be found embodied in our act of 1785. They sustain the jurisdiction of a court of law, and held that the judgment against the lunatic was valid, and that a sale, under an execution issued upon it, passed a good title to the purchaser. Upon the validity of such a judgment, where not prohibited by some statute, they say on page 347 (1 G.), "the authorities, both in this country and England, are conclusive."

Among the English cases we will refer only to the case of *Bagster v. Earl of Portsmouth*, 7 Dow. & Ry. 614. This was an action of *assumpsit* against a lunatic, and although the main question in the case was, whether a lunatic could contract for necessities and whether the items charged in the account, which was the cause of action, could be considered as necessities, yet the validity of the judgment was at issue, and it was upheld by the Court of King's Bench, all the judges concurring.

The text-books are also agreed upon the point. In Freeman on Judgments, 123, § 152, it is said: "While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femmes covert* and infants by judicial proceedings, in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but by a concur-

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rence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them, it is said, are neither void nor voidable, they cannot be reversed for error on account of defendant's lunacy. * * * In a suit against a lunatic, the judgment is properly entered against him, and not against his guardian." See, also, Shelford on Lunatics, pp. (m.) 407 and 429, and 3 Robinson's Practice, p. 240, par. 3, and English authorities there cited.

It is to be said of the case of *Eckstein's Estate*, Select Equity Cases by Parsons, p. 59, which was so strongly relied upon and urged on the part of the appellants, as was said by this court, in 1 Gill, of *Brasher v. Cortland*, it was decided upon the construction given by the court to the particular statute of Pennsylvania, which is very similar in its provisions to the statute of New York, under which the decision of Chancellor KENT was made in the case above referred to. It is clearly inapplicable, and we cannot accept the decision or the reasoning of the court as an authority to govern the case before us.

We have no difficulty in reaching the conclusion, upon the objection of lunacy, that it is no sufficient ground for declaring this judgment a nullity. The jurisdiction of a court of law to render judgment against a lunatic defendant is too well settled to be now questioned, and particularly in this State, since the decision of *Tomlinson's Lessee v. Devore*.

[Omitting other questions.]

Decree affirmed.

BLACK V. MAYOR, ETC., OF BALTIMORE.

(50 Md. 235.)

Municipal corporation — liability for delay in executing ordinance for condemnation of land.

Where a municipal corporation has resolved to condemn land for public use, and culpably or unreasonably delays the prosecution of the work, or abandons it, to the damage of the land-owner, he is entitled to indemnity, whether the delay occurred before or after the completion of the assessment of damages and benefits; but if he acquiesce in the delay, and fails to require the city to go on with the work or repeal the ordinance, he is remediless.

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ACTION for damage to real property. The opinion states the facts. The defendant had judgment below.

Orville Horwitz, for appellant.

James L. McLane, for appellee. The law is well settled in Maryland, "that a municipal corporation has the right to abandon any contemplated improvement and repeal at its pleasure any ordinance providing for the same." *Balto. & Susq. R. R. Co. v. Nesbitt*, 10 How. 395; *Graff v. Mayor, etc., of Balto.*, 10 Md. 544; *State ex rel. v. Graves*, 19 id. 357; *Merrick v. Mayor, etc., of Balto.*, 43 id. 219; *Norris v. Mayor, etc., of Balto.*, 44 id. 598; *Mayor, etc., of Balto. v. Musgrave*, 48 id. 272; s. c., 30 Am. Rep. 458.

It is equally well settled that the "election to abandon cannot be fairly made until all assessments of damages are finally settled, thereby placing before the city council a definite ascertainment of the whole cost of the work;" and that "the work of opening a street from one point to another cannot be properly commenced until the city has thus acquired the right to take all the property through which it may pass." *Norris v. Mayor, etc., of Balto.*, 44 Md. 606; *Mayor, etc., of Balto. v. Musgrave*, 48 id. 272; s. c., 30 Am. Rep. 458.

BARTOL, C. J. It appears from the record in this case that on the 10th day of June, 1871, the mayor and city council of Baltimore passed an ordinance to condemn and open Presstman street, from Gilmor to Monroe street, and that on the 12th day of June in the same year, the commissioners for opening streets gave notice, as required by section 6 of article 43 of the City Code, of 1869, of their intention to meet on the 12th day of July next ensuing, and proceed to execute the ordinance of the 10th of June. On the 17th and 18th of July, the appellants, who owned land lying between Gilmor and Monroe streets, which would be cut by Presstman street, and who claimed compensation for the whole of two lots of ground, a part of which was required for the bed of the street to be opened, surrendered said lots to the city, and the street commissioners sold the parts thereof not included in the bed of the proposed street, in parcels, on the 8th day of August, under section 7, article 43 of the City Code.

Nothing further appears to have been done toward condemning

and opening Presstman street, and no further action was taken in the premises, until the 20th day of May, 1875, when the ordinance of June 10th, 1871, was repealed by the mayor and city council, and the proposed improvement was abandoned.

In May, 1877, the appellants brought this suit to recover from the appellee, damages alleged to have been sustained by them, in consequence of the action of the city in the premises.

The declaration alleges in the second count, that the appellee "delayed unnecessarily, willfully and negligently to proceed in the work of condemning and opening said street, from the time of said sale, until the 20th day of June, 1875, when the said ordinance was repealed. By means whereof the plaintiffs were greatly obstructed and prejudiced in the use and enjoyment of their property."

After the evidence had been offered, the appellants offered three prayers, which were rejected, and the appellee one, which was granted, and the judgment being for the defendant, the plaintiffs have taken this appeal.

The prayer which was granted instructed the jury that "as no assessment of damages or benefits had been made by the commissioners for opening streets, and it being admitted that the city had never taken actual possession of the plaintiffs' property, they had sustained no such damages at the institution of this suit as would entitle them to a verdict."

It is well settled that a corporation may abandon any proposed improvement, and repeal the ordinance authorizing it to be made, and in such case, the land-owner cannot recover the amount of the assessment. This has been decided in numerous cases. We refer only to *Norris v. Mayor, etc., of Baltimore*, 44 Md. 604, and the cases there cited.

While this is settled law, it seems to be equally well settled that where the land-owner has suffered loss by the wrongful acts, or unreasonable delay of the corporation, he may recover damages therefor in an action brought for that purpose. *Graff's case*, 10 Md. 554; *McClellan v. Graves*, 19 id. 375; *Norris' case*, 44 id. 606, and *Musgrave's case*, 48 id. 272; s. c., 30 Am. Rep. 458.

The case of *Norris v. Mayor, etc.*, is relied upon as establishing the principle, that no recovery can be had by the land-owner for damages he may have sustained, before the assessment of damages and benefits has been made. But that case announces no such principle, and no such question was there involved. The claim was for interest

on damages which had been assessed, and the payment of which had been, as alleged, unreasonably delayed by the city.

The court speaks of some delays which are unavoidable, and for which no recovery can be had by the land-owner, such as are caused by assessing the damages and benefits, without which the cost of the work cannot be ascertained ; and acquiring the title to all the property required for the street, which is necessary before the opening of the street can be properly begun, and the delay which is sometimes caused by appeals from the valuation of the commissioners, is also referred to as unavoidable ; but the language of the opinion is very carefully guarded, and does not support the proposition that a corporation, after commencing proceedings of condemnation, and notifying owners that their property will be taken, can unnecessarily delay further action for an unreasonable length of time, thereby depriving the owner of the profitable use of his property, and diminishing its rental value, and yet leave him without remedy. The delays spoken of in that case, and for which the land-owner has no remedy, are those only which are "necessary," and "unavoidable," and "authorized by law." In *Norris* case, as we have before stated, there was neither allegation nor proof that there had been any unnecessary delay on the part of the city, until after the assessments had been completed, and the language of the court must be construed with reference to the particular facts of the case then under consideration.

We think the same principle applies, whether the wrongful acts, or unjustifiable delay on the part of the city occur before or after the assessments have been completed. 2 Dill. on Mun. Corp., § 474, and notes.

We can perceive no good reason why a party who has suffered actual damage by the culpable or unreasonable delay of the city authorities in prosecuting or abandoning a work of this kind, is not entitled to be indemnified for his loss, whether the delay complained of occur before or after the assessment of damages and benefits has been completed. We are therefore of opinion there was error in the general legal proposition asserted in the appellee's prayer.

But we think the prayers of the plaintiffs below were properly refused. They were erroneous in failing to submit to the jury the question of negligence on the part of the defendant, and the question whether, under all the circumstances of the case, the delay on

the part of the city in repealing the ordinance was unreasonable. In passing upon the question of what is unjustifiable or unreasonable delay on the part of the corporation, it is obvious that a different rule and different considerations apply to a case in which the assessments have all been completed, and to one like the present where the ordinance has remained almost entirely unexecuted. In the former case, any unreasonable delay on the part of the city would be unjustifiable, because nothing further is required to be done, to enable the city authorities to determine whether the proposed work shall be prosecuted ; and nothing remains to be done, but to pay the damages assessed, or to abandon the work. Whereas in this case no such progress had been made in the execution of the ordinance, as would enable the city authorities to determine whether the public interest required them to prosecute and complete the work, or ultimately to abandon it. Nor is it possible to determine by proof how long a time might have been required to complete the assessments, if the work of condemning and opening the street had been prosecuted ; and it would be alike difficult, if not impossible, to ascertain by any definite proof, at what period, culpable or inexcusable delay on the part of the city commenced.

In dealing with a corporation like the appellee, engaged in a work of public improvement, having large and important interests to consult, we cannot fail to see that delays must unavoidably occur. And we have no hesitation in laying down the rule, that where an ordinance of this kind has been passed and remains unexecuted, or but partially carried into effect, and there is no remonstrance or complaint by parties interested ; or any application by them to the city council to go on with the work, or to repeal the ordinance ; but such parties remain silent, apparently acquiescing in the delay, it is not unreasonable for the city council to conclude that no person is suffering loss or damage by the delay, and in such case, there being no act on the part of the property holder to put the city in default, culpable delay or negligence cannot be imputed to the city, and no action lies.

In this case the record does not disclose that any action of that kind was taken by the appellants. Without this, in our opinion, the present suit cannot be maintained ; and therefore a new trial will not be ordered, except upon the application of the appellants.

[Omitting a question of damages.]

In our judgment the appellants are entitled to recover, only by

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showing, as before stated, some action on their part whereby the city was put in default ; and then only for such special damage as they actually suffered from the default and negligence on the part of the defendant.

Judgment reversed, with leave to appellants to apply for a remand of the case for a new trial.

Judgment reversed.

DITTMAN V. REPP.

(50 Md. 516.)

Nuisance — injunction — steam engines.

An injunction will issue to restrain the operation of steam machinery which jars and shakes the complainant's house so as to render it unsafe or unfit for habitation.*

SUIT for injunction. The opinion states the case. The injunction issued below.

Alfred J. Carr, for appellants. The injury complained of by the appellee is merely a disturbance of the comfortable enjoyment of his dwelling by reason of a loud noise ; all the rest is opinion and surmise. *Powell v. Rawlings*, 38 Md. 239 ; *Nicodemus v. Nicodemus*, 41 id. 529 ; 2 Phila. 76 ; Wood on Nuisances, 151, 484 ; 57 Penn. St. 289.

Isador Raynor, for appellee.

ALVEY, J. The appeal in this case is from an order granting an injunction, and under our practice, it is to be considered on the allegations of the bill alone, irrespective of the answer. If the defendants had desired the benefit of their answer, they should, upon filing it, have moved to dissolve the injunction, and then, on an appeal from the order disposing of that motion, the answer would have been before us for consideration. They have not pursued that course, however, and their answer cannot be considered.

*To same effect, *McKeon v. Lee* (51 N. Y. 300), 10 Am. Rep. 659 ; *Sturges v. Bridgman*, 20 Alb. L. J. 389.

The complainant alleges that he and the defendants occupy adjoining premises on Bond street in the city of Baltimore; that the defendants are brewers and carry on the business of brewing beer in the premises occupied by them; that they have recently changed the manner of conducting their business, and have introduced into their building adjoining that occupied by the complainant, steam machinery of a formidable character, and placed the same with its pipes and attachments alongside the wall of the building of the complainant, and in direct contact therewith, and that such machinery is in full operation. He then alleges that the use of this new machinery causes a continual loud and deafening noise, during the time of its operation, through the entire premises of the complainant, and that such noise is of extraordinary force and volume, producing a heavy jarring sound throughout his premises; that this noise has become so disagreeable and offensive to the complainant and his family residing in the house, that with a due regard to their health and comfort, it will be impossible for them to remain in the house, unless this interference with their enjoyment thereof be discontinued. He further alleges, that the operation of the machinery by the defendants produces a continual vibration and jarring in all the apartments of his house, shaking the walls and rendering the house unfit and unsafe to reside in.

These allegations, standing alone, are certainly strong enough to bring the case within the authorities, and to entitle the complainant to relief.

In the case of *Adams v. Michael*, 38 Md. 123; s. c., 17 Am. Rep. 516, this court held that a court of equity will interfere and restrain by injunction an existing or threatened nuisance to a party's dwelling, if the injury be shown to be of such a character as to diminish materially the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it, and that the injury be such as to entitle the party complaining to substantial damages in an action at law. That was the case of a manufacturing establishment about to be erected in immediate proximity to the dwellings of the parties complaining, and where, according to the allegations of the bill, large volumes of smoke, offensive odors and noxious vapors would be emitted from the factory, during its operation, whereby the value of the dwellings would be materially lessened, and the comfort of their occupiers greatly interfered with, and their health impaired. The injunction was refused in that

case, but solely because of the defective allegations of the bill. Here the allegations of the bill are sufficient, and the principles laid down in the case of *Adams v. Michael* fully apply. In all such cases, the question is, whether the nuisance complained of will or does produce such a condition of things, as in the judgment of reasonable men is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits and as in view of the circumstances of the case is unreasonable and in derogation of the rights of the complainant. This is the criterion laid down in the authorities, and unless the facts show such a state of things, a court of equity will not interfere. Wood's Law of Nuisance, 599, and cases there cited. And in determining the question of nuisance from smoke or noxious vapor, or from noise or vibration, such as alleged in this case, reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of. A party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance that he might rightfully claim if he were dwelling in the country. Every one taking up his abode in the city must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent. Or as it has been better expressed by Lord Chancellor WESTBURY, in *Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608; 11 H. of L. Cas. 642, 650, in speaking of a case where the alleged nuisance was occasioned by smoke, "If a man lives in a town, of necessity he must submit himself to the consequences of the obligations of trades which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town. If a man live in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop." And so Lord CRANWORTH said: "You must look at it, not with a view to the question whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to the person living in the town." But still, as we have said, there is a limit

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to the discomforts and annoyances to which a party may be required to subject himself without remedy, by living in a city, or a manufacturing district; and the authorities are numerous which hold that noise alone, if it be of such character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, may create a nuisance, and be the subject of an action at law, or an injunction from a court of equity, though such noise may result from the carrying on of a trade or business in a town or city. *Bradley v. Gill*, Lutw. 69; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Salten v. De Held*, 2 Sim. (N. S.) 133; *Inchbald v. Barrington*, L. R., 4 Ch. App. 388; *Ball v. Ray*, L. R., 8 Ch. App. 467; *Crump v. Lambert*, L. R., 3 Eq. Cas. 409; *Fish v. Dodge*, 4 Den. 311. Here superadded to the mere noise made by the operation of the machinery, it is alleged that the working of the engine or pump produces strong vibratory and jarring motions, which shake the complainant's house, and render it unfit and unsafe for habitation. Such state of things, if true, clearly amount to a nuisance, such as will give a right of action at law or a court of equity will restrain. *Scott v. Firth*, 4 Fost. & Fin. 349. We shall therefore affirm the order granting the injunction.

Order affirmed, and cause remanded.

Order affirmed.

ROBERTSON V. BERRY.

(50 Md. 501.)

Trade-mark — name of publication.

The complainant had for some twenty years published an almanac entitled "J. Gruber's Hagerstown Town and County Almanack," which had been established and long published by his ancestor. The defendant, in 1879, issued an almanac, with the same emblems, devices, marks, representations, and general exterior appearance, and entitled, "T. G. Robertson's Hagerstown Almanac." *Held*, that the defendant's publication would be enjoined. (See note, p. 835.)

SUIT for injunction. The opinion states the case. The motion for injunction was granted below.

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S. T. Wallis, for appellant. No person has a right to monopolize the name of a place or a geographical district, as an element in a trade-mark. *Canal Co. v. Clark*, 13 Wall. 322. Gruber's title to his trade-mark, if he had any, and if it were assets, could only pass by way of administration. *Cecil v. Rose*, 17 Md. 101, 102; *Same v. Clark*, id. 520, 521. But the good-will of a printing office, which is all that the parties really claimed, until of late and with a view to this controversy, is not assets. *Seligman v. Marshall*, 17 Md. 569. The appellees, having derived no title or right lawfully from Jacob Gruber, and having printed their almanac for many years under a false pretense of such title, and sometimes as individuals, now one, now many, have no right under Gruber upon which they can maintain their present proceeding, or appeal to a court of equity. They have no standing in court, upon the ground of a violation of their own original rights created and secured by their own dealing with the alleged trade-mark and their own skill and labor since Gruber's death; for that is not the case made by their bill, and to maintain their interlocutory injunction they must rest on their bill only.

Edgar H. Gaus and *John P. Poe*, for appellees.

MILLER, J. This appeal is from an order granting an injunction restraining the appellant from publishing and circulating a certain almanac for the year 1879, known as "T. G. Robertson's Hagerstown Almanack," with the same emblems, devices, marks, representations, title and back outside pages, style, shape and general appearance as have characterized the publications of the same for previous years, and from printing, publishing and circulating any other almanac in colorable imitation of the almanac of the complainants, known as "J. Gruber's Hagerstown Town and Country Almanack," and calculated to deceive and impose upon the public, and to create in their minds the belief that such almanac is really and truly the almanac of the complainants. In determining whether this order shall be affirmed or reversed this court is confined to the case made by the bill and exhibits, without reference to the averments of the answer which appears in the record. *McCann v. Taylor*, 10 Md. 418.

It is immaterial to the decision of the case, in the view we have taken of it, whether the devices, marks, pictures and words, in the

manner in which they are collocated and combined upon the two outside pages of the complainant's almanac, be regarded as a trade-mark proper or as wrappers or labels, or as the title or the particular external marks which an author or publisher affixes to his work to distinguish it, because the grounds of relief in equity are substantially the same in either case. A publisher or author has either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade-mark, and may like a trader claim the protection of a court of equity against such a use or imitation of the name, marks or designations as is likely in the opinion of the court to be a cause of damage to him in respect of that property. Kerr on Injunctions, 478; Browne on the Law of Trade-Marks, § 553. This doctrine, in cases where the facts are sufficient to sustain it, has been held applicable to such periodical publications as newspapers, magazines and almanacs. *Matsell v. Flannagan*, 2 Abb. Pr. 459; *Hogg v. Kirby*, 8 Ves. 215; *Spottiswoode v. Clark*, 10 Jur. 1043. But here, as in cases of trade-marks proper, the complainants must show a property right in themselves, and a fraudulent or colorable imitation by the defendant, and we shall therefore proceed to consider whether these two essential requisites to relief in equity are made out by the bill and exhibits before us.

1st. And first, assuming the complainants or some of them have established their own right to the symbols, marks and devices, as used on their almanac, has there been such an imitation of them by the defendant on her almanac as to entitle the former to have the publications by the latter enjoined? Upon the question of resemblance, the authorities all agree that it is impossible to lay down any general rule as to what degree of resemblance is necessary to constitute the fraudulent or colorable imitation. All that can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as that ordinary purchasers purchasing with ordinary caution are likely to be misled. Kerr on Injunctions, 483; *McLean v. Fleming*, 6 Otto, 245. In the case last cited there is a very complete review of the authorities, and the court says that "much must depend in every case upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If

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the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights and to prevent their continued invasion." In the case of *Seixo v. Provezende*, L. R., 1 Ch. App. 192, Lord Chancellor CRANWORTH expresses substantially the same views thus: "what degree of resemblance is necessary from the nature of things is a matter incapable of definition *a priori*. All that courts of justice can do is to say that no trader can adopt a trade-mark so resembling that of a rival as that ordinary purchasers purchasing with ordinary caution are likely to be misled. It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser looking at the article offered him would naturally be led, from the mark impressed on it, to suppose it to be the production of a rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark to be fraudulent." Among other authorities to the same effect, and as having an important bearing upon the case before us, we refer to *Holloway v. Holloway*, 13 Beav. 209; *Amoskeag Manfg. Co. v. Spear*, 2 Sandf. 599; *Swift v. Day*, 4 Rob. 611; *Williams v. Johnson*, 2 Bosw. 1; *Lea v. Wolff*, 15 Abb. Pr. (N. S.) 1; *Gillott v. Esterbrook*, 47 Barb. 455; *Burke v. Cassin*, 45 Cal. 467; s. c., 13 Am. Rep. 204; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; *Howard v. Henriques*, 3 Sandf. 725; *Knott v. Morgan*, 2 Keen, 213; *Perry v. Truefit*, 6 Beav. 66; *Croft v. Day*, 7 id. 84; *Wotherpoon v. Currie*, 22 L. T. (N. S.) 260, and *Canal Co. v. Clark*, 13 Wall. 322. In the present case we are clearly of opinion the imitation is such as is well calculated to mislead ordinary persons purchasing with ordinary care. It is unnecessary, even if it were practicable, to present a detailed description in words, showing the resemblance of the first or title pages of these two almanacs, as it appears to the eye. It is plain enough to the eye of the observer, but difficult to be described. There is a difference in the names and in some of the words used, and there are several marks of distinction in the symbols or pictures and the border inclosing them,

which a careful inspection soon discloses, but there is exact similitude in the color, size, shape, and in the different type in which the more and less prominent words and figures are printed, as well as in the paper and binding of each. These make the resemblance at first sight quite sufficient to deceive the "ordinary run of persons," even if the two were lying side by side on the counter of a book-store, or in a newspaper stall, while the back outside pages of each are in every respect identical. This part of the complainant's case is, in our opinion, clearly made out.

2d. As to the property right. On this subject the authorities all declare that the right of property in the plaintiff must be clearly shown. *Witthaus v. Mattfeldt*, 44 Md. 303. From the averments of the bill, to which we are confined, it appears that about the year 1835, John Gruber, the ancestor of some of the complainants, commenced the publication of an almanac to which he gave the name of "J. Gruber's Hagerstown Town and Country Almanack," and for the purpose of distinguishing it from all other publications of almanacs he adopted and made use of certain devices, emblems, representations, marks and pictures, which he combined and collocated in a manner entirely new and original, and these are the same as those now used on the almanac of the complainants. He continued this publication annually from 1835 to his death in 1858, and by his skill in the order and arrangement of the calendar, and the variety of the miscellaneous matter inserted therein, he acquired the good-will of the public and a large circulation for his almanac, and it was a source of profit and revenue to him during his life-time, and the emblems and devices before described became identified with his said publication and were the means by which it was known and distinguished by the trade. This, according to the averments of the bill, was the origin of the emblems and devices in which the complainants now claim a property right. In our opinion that right does not depend upon the derivation of a legal title from John Gruber, either through his will, or by the administration *de bonis non c. t. a.*, taken out long after his death, for the purpose of obtaining title to, and distributing, as assets of his estate, these alleged trade-marks and the good-will of this printed publication, and we therefore dismiss from consideration all the averments of the bill on this subject. But it seems to us that the claim and right can be well tested upon another ground. The bill shows that in 1854, Gruber being then aged and infirm, and unable

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to perform the manual labor for the printing and issuing of the almanac, continued its publication through the agency of William Stewart and Thomas G. Robertson, by a letter of license and authority to them which was printed on the second page of each issue. For many years prior to his death and before this agency of Stewart and Robertson, the surviving members of his family had contributed their labor in the publishing and preparation of these almanacs for the market. After his death his widow and executrix continued the annual publication during her life on account of herself and the other surviving members of the family, and did so through the business management of Robertson, notice of which was printed on each number, and during her life it was a source of revenue to her and her family and was their only means of support. The widow died in 1866, and the annual publication was continued by the family also under the business management of Robertson, notice of which was also printed in each number. In 1874, one of the daughters died, after which two other daughters, for the use of themselves and the surviving members of the family of John Gruber, continued the publication and are now, by their assignees (who are also complainants), printing and publishing this almanac. During all this period from the death of Gruber, nearly twenty years, the publication was continued in his name, and two of his daughters sue in this case as copartners trading under the name and style of "J. Gruber." It was so continued and is now annually published by the complainants in the same style, with the same emblems, pictures and devices, with the same title-pages, distribution and arrangement of matter which had distinguished it during the life of Gruber. His family, by the manner in which they have conducted the publication, have retained the good-will of the public, increased its circulation, and at the present time, under their management and that of their assignees and agents, its circulation is extensive, and the good-will attendant upon it valuable, and since Gruber's death it has always been and is now known to the trade and public generally by the same emblems, devices, marks and representations before stated. The sole and exclusive right of Gruber's family so to publish and sell this almanac was acknowledged and acquiesced in by all persons, and especially by Robertson, the husband of the defendant, who was the agent of Gruber and his family, as before stated, and afterward by his widow, the defendant; for upon

Robertson's death in 1869, his executors contracted with the members of the Gruber family for its publication for the period of five years, and the latter authorized and permitted the executors to publish it for that time, and they did so up to the year 1875, and during this period Mrs Robertson and her children received all the revenues and profits arising from its sale, except the sum of \$450 per annum which was paid to the family of Gruber as a royalty for the license so to print and publish. After this and during the years 1876, 1877 and 1878, Mrs. Robertson commenced and continued the publication of her almanac, which the bill charges to be a fraudulent imitation of that of the complainants. Without noticing at length many other allegations of the bill, the facts thus stated show that the complainants have acquired a property right in the devices, emblems and title pages in question by adoption and user. That such right may be so acquired appears to be well established by authority. Thus in *Eddleston v. Vick*, 18 Jur. 8, it was held and expressly decided by the vice-chancellor Sir W. PAGE WOOD, that the right of property in certain labels or engraved papers or wrappers, in which pins manufactured by the plaintiff were put up, could be acquired by user alone. "If," says his lordship, "the plaintiff or those under whom he claims has used this label continuously for a certain space of time, that is enough to enable him to prevent others from using it and making a profit out of the reputation which that label has acquired in the market." The plaintiff in that case was not the original inventor or proprietor of the labels or engraved papers or wrappers, but claimed from the assignees in bankruptcy of a former partner of the original proprietor and inventor. He had however carried on the business and used the labels for a period of more than eleven years, and by this alone he was held to have acquired a right of property in them. So in *Canal Company v. Clark*, 13 Wall. 322, the Supreme Court say: "Undoubtedly words or devices may be adopted as trade-marks, which are not original inventions of him who adopts them, and courts of equity will protect him against any fraudulent appropriation or imitation of them by others." In such cases the adoption and use must be under such circumstances of good faith, as to satisfy the court that the plaintiff is not himself practicing a fraud upon the public. He must explain how he came to such adoption and use, or in other words, he must come into court with clean hands. It seems to us very clear that such explanation is abundantly given by the bill in this

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case, and the adoption and user thus made out entitle the complainants to the injunction prayed for. It is scarcely necessary to add, that a court of equity interferes in such cases to prevent fraud, and this is the broad ground upon which its jurisdiction rests.

3d. It was suggested and contended in argument, that the averment that the complainants are credibly informed and verily believe, and therefore charge, that the defendant has printed, published and issued, or caused to be printed, published and issued, within the last few days, an edition of her almanac for the year 1879, in the same fraudulent and colorable imitation of that of the complainants, is not sufficient to justify the granting of the injunction. But without stopping to inquire whether this averment by itself would be sufficient, we find referred to in the bill, and filed as an exhibit with it, a copy or number of the defendant's almanac for the year 1879, exhibiting precisely the same appearance and characteristics as those of the two previous years, and equally resembling that of the complainants. This is quite sufficient to satisfy the court upon the point suggested.

The order appealed from will therefore be affirmed ; and in so doing we must be understood as intimating no opinion upon any other question than the one directly before us, viz. : that the averments of the bill are sufficient to justify the granting of the injunction prayed for.

Order affirmed, and cause remanded.

Order affirmed.

NOTE BY THE REPORTER.—We are indebted to the *Solicitors' Journal* for the following exhaustive summary of the cases on the point of fraudulent imitation of a name of a publication : In *Hogg v. Kirby*, 8 Ves. 215, the proprietor of "The Wonderful Magazine" succeeded in stopping the publication of "The Wonderful Magazine, New Series, Improved." In *Edmonds v. Benbow*, Seton (3d ed.), 905, the proprietor of "The Real John Bull" was held to be entitled to an injunction to restrain the publication of another paper as "The Old Real John Bull." In *In re Edinburgh Correspondent Newspaper*, Ct. of Sess. Cas., 1 ser. I, new ed., 407 n., the same name was prevented from being used. In *Constable & Co. v. Brewster*, Ct. of Sess. Cas., 1 ser., III, 215, new ed. 152, it was decided that "The Edinburgh Philosophical Journal" was interfered with by the publication of a "New Series of the Edinburgh Philosophical Journal." So in *Chappell v. Sheurd*, 2 W. R. 646 ; 2 K. & J. 117 ; and *Chappell v. Davidson*, 2 K. & J. 123 ; where the plaintiff's song was entitled "Minnie," and those of the respective defendants "Minnie Dale" and "Minnie, Dear Minnie." So, again, where the purchaser of "The Britannia" newspaper incorporated it with the "John Bull," under the name of "The John Bull and Britannia," and the former publisher of "The Britannia" began to publish "The True Britannia;" *Prowett v. Mortimer*, 4 W. R. 419 ; 2 Jur. (N. S.) 414. In *Clement v. Maddick*, 1 Giff. 98, the plaintiff's newspaper was called "Bell's Life in London," and the defendants' "The Penny Bell's Life and Sporting News." The "London Daily Journal" was too near to the "London Journal;" *Ingram v. Stiff*, 8

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Jur. (N. S.) 947. So "The United States Police Gazette" to "The National Police Gazette," commonly known as "The Police Gazette;" *Matsell v. Flanagan*, 2 Abb. Pr. (N. S.) 459. So "The Bedfordshire Express and General Advertiser for the County," to "The Bedfordshire Express and General Advertiser for the Counties of Cambridge, Hertfordshire, Huntingdonshire and Middlesex;" *Chance v. Sheppard*, V. C. M., July 30, 1869: In *Clowes v. Hogg*, W. N., 1870, p. 268; 1871, p. 40, the former proprietor of "London Society," began to publish "English Society," and was restrained. Again in *Mack v. Petter*, 20 W. R. 934; L. R., 14 Eq. 431, the plaintiff's book was called "The Birthday Scripture Text-Book," and the defendant's, "The Children's Birthday Text-Book." In *Corns v. Griffiths*, W. N., 1873, p. 93, the plaintiff's paper was called "The Iron Trade Circular (Rylands)," and the defendant's, "The Iron Trade Circular (Edited by Samuel Griffiths)." In *Metzler v. Wood*, 26 W. R. 577; L. R., 8 Ch. D. 606, the plaintiff's book was called "Henry's Royal Modern Tutor for the Pianoforte," and the defendant's, "Henry's New and Revised Edition of Jousse's Royal Standard Pianoforte;" and lastly, in *Weldon v. Dicks*, the tale was in each case styled "Trial and Triumph." In all the above cases the infringement was restrained. In the following cases the remedy sought was refused: In *Spottiswoode v. Clarke*, 2 Ph. 184, the question was between "The Pictorial Almanack" and "Old Moore's Pictorial Almanack;" in *Snowden v. Noah*, Hopk. 347, between "The National Advocate" and "The New York National Advocate;" in *Bell v. Locke*, 8 Paige, 75, between "The Democratic-Republican New Era" and "The New Era;" in *Stephens v. De Couto*, 30 N. Y. Sup. Ct. 343, between "La Cronica" and "El Cronista." "Punch" was the property of the plaintiffs in *Bradbury v. Beeton*, 18 W. R. 33, and "Punch and Judy" of the defendant; in *Tallcot v. Moore*, 13 N. Y. Sup. Ct. 106, the plaintiff's book was "The Little Red Book, New Series, 1873," and the defendant's, "The Red and White Book;" and *The American Grocer Publishing Association v. Grocer Publishing Company*, 51 How. Pr. 402, was a similar case. *Ledger v. Ray*, Ct. of App., May 3, 1877, was a somewhat peculiar case, as the question was not confined to the two titles, "The Era" and "Touchstone," or "The New Era," but Touchstone was also the name of a well-known writer in the plaintiff's paper. And again in *Kelly v. Byles*, 46 L. T. (N. S.) 623, the plaintiff's compilation was called "The Post-office Directory of the West Riding of Yorkshire," and the defendants', "The Post-office Bradford Directory."

In *Potter v. McPherson*, N. Y. Sup. Ct., July, 1880, the title "National System of Penmanship," on writing-books, was held entitled to protection.

In respect to fraudulent imitation of a name of goods; in *Barnett v. Kent*, Pennsylvania Common Pleas, April 3, 1880, 8 W. N. C. 355, the plaintiffs, manufacturers of files and rasps, used labels with the words "Black Diamond File Works," with a black diamond printed thereon, and a file printed across the face of the diamond, and stamped on their files the figure of a diamond, with the words "Black" and "Works," and their name "G. & H. Barnett." The defendants, Kent & Co., limited, placed upon packages of files manufactured for them by Alexander Krumbhaar, labels containing the words "D. H. Kent & Co., limited, agents, Philadelphia, Pa., Diamond State File Works," with the figure of a diamond inclosing the word "State;" a diamond inclosing the word "State" was also stamped upon their files. The plaintiffs alleged that the defendants had no interest in any factory known as the "Diamond State File Works." The plaintiffs' counsel cited the following instances in which imitations have been granted, the trade-mark being first given, and the imitation following: Ohio Liniment, Chinese Liniment; London Conveyance Co., London Conveyancer Co.; Heroine, The Heorine; Hall's Vegetable Sicilian Hair Restorer, Vegetable Sicilian Hair Renewer; Rising Sun, Rising Moon; Seal of Virginia Smoking Tobacco, Seal of West Virginia Smoking Tobacco; Lithogen, Krause's Patent Old Lithogen; Wamsutta, Wamyesta; Excelsior, New Excelsior. To which we may add, from our own recollection, Cocaine, Cocaine; Boviline, Bovina; Gourand's Oriental Cream or Magical Beautifier, Creme Oriental by Dr. T. F. Gourand's Sons; Sapolio, Saphia; AAA and a Maltese cross, XXX and a crown.

In respect to a man's name as a trade-mark, see *Meriden Britannia Co. v. Parker*, 39 Conn. 450; s. c., 20 Am. Rep. 401, and note, 409; *Menedy v. Menedy*, 62 N. Y. 427; s. c., 20 Am. Rep. 489. These cases involve the right of a man to use his own name.

The writer in the *Solicitors' Journal* continues: "A very lucid and valuable statement of the general law on this subject will be found in the judgment of the Privy Council (delivered by the late Lord CHELMSFORD) in the case of *Du Boulay v. Du Boulay*, L. R., 2 P. C.

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441, where the object of the suit in which the appeal was brought was to restrain one man from assuming another man's family name. What Lord CHELMSFORD says is this: 'In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to be guilty of a fraud, or at least, of an invasion of another's rights, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress.'

"In *Clark v. Freeman*, 11 Beav. 112, Lord LANSDALE refused to accede to the contention of an eminent physician, named Sir James Clark, who did not manufacture or sell pills or other medicines, and to restrain another person from advertising or selling pills under the name of 'Sir J. Clark's Consumption Pills.' There could, of course, be no question with respect to the object the defendant had in view, but the master of the rolls considered that since the plaintiff did not sell pills, there could be no injury to property even if the defendant's pills were bought under the impression that they were made by the plaintiff; the plaintiff could not thereby lose the sale of any genuine pills. Other judges have observed unfavorably upon this decision, and Lord CAIRNS in *Maxwell v. Hogg*, L. R., 2 Ch. 307, said that it had always appeared to him that the case might have been decided in favor of the plaintiff on the ground that he had a property in his own name. In *Levy v. Walker*, 10 Ch. Div. 436, Lord Justice JAMES said: 'The sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark. That is to say, somebody has a right to say, 'you must not use a name, whether fictitious or real, or a description, whether true or not, which is intended to represent, or is calculated to represent, to the world that your business is my business, and therefore deprive me by a fraudulent misstatement of yours of the profits of the business which would otherwise come to me.' That is the sole principle on which the court interferes. The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything." In *Cave v. Myers*, Vice-Chancellor GIFFARD (December 8, 1868) granted an injunction to restrain a fraudulent imitation of the name of a tradesman named 'Cave,' by a neighbor who, occupying a corner shop, painted up the name 'Cavendish House' in such a manner that 'Cave' alone appeared in the same street as the plaintiff's shop, the remainder of the inscription being round the corner of the next street.

"When a name has been employed in an appropriate manner, the right acquired therein is not merely a right in the nature of a trade-mark, but it is an actual and positive right of trade-mark, for, to use Lord HATHERLEY's language in *Ainsworth v. Walsley*, L. R., 1 Eq. 518, 'Is not a man's name as strong an instance of trade-mark as can be suggested? subject only to this inconvenience, that if a Mr. Jones or a Mr. Brown relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name.' Injunctions have repeatedly been granted, both in England and America, to restrain the use of names which have become trade-marks, as, for instance, in *Ainsworth v. Walsley*; *Rogers v. Newill*, 6 Hare, 825; *Holloway v. Holloway*, 13 Beav. 209; *Wolfe v. Barnett*, 24 La. Ann. 97; s. c., 13 Am. Rep. 111. In Scotland, as early as 1823, an interdict was granted in *Wylie v. McMulloch*, 2 S. 413, to restrain the wrongful use on ploughs of the name of a well-known plough manufacturer. There is, then, no doubt that it is generally recognized that a name may become and be protected by a trade-mark when the necessary conditions have been complied with, subject, indeed, to the limitation pointed out in *Ainsworth v. Walsley*, which was thus restated by the Supreme Court of Massachusetts in *Gilman v. Hunnewell*, 122 Mass. 139: 'A person may have a right in his own name as a trade-mark as against a person of a different name. But he cannot have such a right as against another person of the same name unless the defendant uses a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture.' The law on the whole subject

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was carefully considered and laid down in the same way in *McLean v. Fleming*, 96 U. S. 245. In *Howe v. Howe Machine Company*, 50 Barb. 236, it was even held that A. B. Howe, who had been accustomed to manufacture sewing machines under a license from his brother, the original patentee and inventor, Elias Howe, and to mark such machines with the name of 'Howe,' was entitled to a right in the name capable of protection even against Elias Howe and those claiming through him, though no injunction was actually granted, there being a question to be decided with respect to an alleged agreement between the parties, authorizing the defendant to use the name. When a name has once been turned into a trade-mark, and a proprietary right acquired therein, this right in the name is capable of protection even after it has passed away from the person to whom it originally belonged. Thus the Court of Appeals decided in *Massam v. Thorley's Cattle Food Company* (see 81 Alb. L. J. 171), that the executors of the originator of 'Thorley's Cattle Food' were entitled to restrain the use of the name by a company formed for the purpose of manufacturing a similar article, thus practically overruling *James v. James*, L. R., 13 Eq. 421. And the same is the case when what has happened is not the death of the proprietor, but an assignment of the business, carrying with it the right to use the trade-marks, in which a trade-mark consisting of a name, but which has ceased to possess a personal significance, would be included. 'A name, though originally the name of the first maker, may in time become a mere trade-mark or sign of quality, and cease to denote, or to be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is accepted in the market either as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person.' Per Lord WESTBURY, in *Hall v. Barrow*, 4 De G. J. & S. 150; *Leather Cloth Company v. American Leather Cloth Company*, id. 144. But it must not be forgotten that the assignability of a name trade-mark entirely depends upon the personal element having been wholly eliminated. *Leather Cloth Company's case*, *supra*, and also in House of Lords, 11 H. L. C. 523; *Bury v. Bedford*, 4 De G. J. & S. 352. Thus, when the founder of a theater which he had called after his own name, 'Booth's Theatre,' and which he had described by that name in various mortgages of the premises, sought to restrain the assignees of the lease of the premises from continuing to call the theater by that name, the injunction was refused, on the ground that the name had become the name of the establishment, and had ceased to imply any personal interference of the plaintiff. *Booth v. Jarrett*, 52 How. Pr. 169.

"It is not with business pursuits in the ordinary sense exclusively that the name claimed must have been connected. In *Lord Byron v. Johnston*, 3 Mer. 29, the name protected was the name of a poet; in *Archbold v. Sweet*, 1 M. & Rob. 162, it was the name of an author of legal works; in *Christy v. Murphy*, 19 How. Pr. 77, and *Montague v. Moore*, Wood, V. C., March 1, 1865, it was the name of the organizer of a troupe of Ethiopian minstrels. Nor does it make any difference whether the name is a genuine or an assumed one. In *Jackson v. Thompson*, 20 W. R. 196, the plaintiff, a milliner, was carrying on business as 'Madame Louise'; in *Clemens v. Such*, N. Y. Supreme Court, July 11, 1873, the plaintiff had written humorous books under the *nom de plume* of 'Mark Twain.' But whether the name be real or fictitious, the use by the defendant must be such as to be calculated to deceive, so that where no deception is to be anticipated, no relief will be granted, as in the case of 'Claribel's' songs. *Barnard v. Pillow*, W. N. 1868, 94. In *Gourand v. Trust*, 10 N. Y. Supr. Ct. 627, the plaintiff had changed his name from Trust to Gourand, under which name he sold 'Gourand's Oriental Cream,' and the defendants, who were restrained by injunction, were his sons, who had retained their original name, but had begun to sell a preparation as 'Creme Oriental, by Dr. T. F. Gourand's Sons.' And in such cases as the above the fraudulent use of another's name is criminally punishable, either on a prosecution for false pretenses or on one for a cheat at common law; but such an offense is not forgery, as was decided in the case of the name of the painter Linnell. *R. v. Closs*, D. & B. 400.

Even apart from a trade or business, a person whose name has without authority been injuriously used by another is entitled to an injunction, as in *Routh v. Webster*, 10 Beav. 561; and even though what the defendant has done amounts to a libel, it seems that, if he does not exercise his right of claiming a jury at the proper time, but allows that oppor-

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tunity to slip, he will not be allowed afterward to contend successfully that the court has in jurisdiction to grant an injunction to restrain a libel without the verdict of a jury. *Masam v. Thorley's Cattle Food Company, supra*; *Thomas v. Williams, supra*. In *Reid v. Stobald*, 18 Jour. of Jurisp. 392, the Scotch court granted an interdict to restrain a name intended to represent the name of a sheriff's officer from being used in such a manner as to bring discredit and ridicule upon the latter, who would thus be injured in his position in life."

The foregoing review excludes the case of agreement for one to use another's name; the right of a surviving partner or a purchaser to use the former firm name; and the right of a patentee to restrain the use of his name on similar articles; as depending on different principles.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

RINDSKOPF V. DE RUYTER.

(89 Mich. 1.)

Contract — place of — delivery to carrier.

An oral order, in Michigan, to the agent of a Wisconsin firm, for liquors to an amount exceeding fifty dollars, subject to acceptance or rejection on arrival in Michigan, followed by delivery to a carrier in Wisconsin, does not constitute a binding contract under the Wisconsin statute of frauds, and is void under the Michigan prohibitory law.*

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Taggart, Simonds & Fletcher, for plaintiffs. Acceptance of goods sold under a verbal agreement makes the contract valid from the date of the agreement, by relation. *Vincent v. Fermond*, 11 Johns. 283; *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; *Seymour v. Davis*, 2 Sandf. 239; *McKnight v. Dunlop*, 5 N. Y. 537; *Marsh v. Hyde*, 3 Gray, 331; 2 Schoul. on Pers. Prop. 448; *Townsend v. Hargraves*, 118 Mass. 325; *Bird v. Munroe*, 66 Me. 337; s. c., 22 Am. Rep. 571; 9 Am. Law. Rev. 434.

Blair, Eggleston, Kingsley & Kleinhans, for defendant.

* To same effect, *Kelwert v. Meyer* (62 Ind. 587), 20 Am. Rep. 206.

Rindskopf v. De Ruyter.

MARSTON, J. Plaintiffs, copartners in trade at Milwaukee in the State of Wisconsin, sold to defendant, doing business in Grand Rapids in the State of Michigan, spirituous liquors. This action was brought to recover a balance claimed to be due upon such sale.

The defendant interposes three objections to the right of plaintiffs to recover.

First, that the agreement under which these liquors were sold and delivered was entered into in Michigan, and therefore void under Comp. L., § 2137.

Second, that by the terms of the original agreement defendant had the right to examine the goods at Grand Rapids and return them if not as represented; that he was dissatisfied with the goods and offered to return them; that a part was returned, and under an arrangement made with plaintiffs' agent in Grand Rapids a deduction was made upon the price of the goods retained; that the effect of such right of examination, return, offer to return, and reduction in price, determined that the actual sale was made in this State, aside from all questions of the validity of the contract considered as a Wisconsin contract or sale; and

Third, that if the contract was to be considered as a Wisconsin contract it was void under the statute of frauds of that State.

The referee in his finding of facts sets forth the circumstances of the sale; that defendant gave to plaintiffs' agent, who called upon him in Grand Rapids, a verbal order for the liquors referred to; that the sale was to be on ninety days' credit, and the defendant was at liberty to return the liquors if not as represented by the agent; "that the agent was to submit the order for the goods to plaintiffs, and if it met their approval, they should be sent."

This finding brings this case clearly within the decisions of this court in *Kling v. Fries*, 33 Mich. 275, and *Webber v. Howe*, 36 id. 154; s. c., 24 Am. Rep. 590, and disposes of the first objection. In accordance with the rule laid down in these cases, the original agreement in this case must be considered as made in the State of Wisconsin and not in Michigan.

As to the effect of the offer to return the goods and the reduction made in the price as set forth in defendant's second objection, I do not see how this can be considered as the sale upon which the acceptance of the goods were made and the purchase-price determined as claimed. It is true that here was an offer made to return

the goods because not as represented. A part, however, had been sold by defendant at this time and could not therefore be returned, and there was also a reduction made from the contract price upon what was retained. At most this was but a modification of the original agreement. It did not abrogate or annul that agreement. It was rather a recognition of the validity and binding effect of the original agreement. The change made was a reduction of five cents per gallon from the price fixed in the original agreement. In all other respects the original agreement stood, and the rights of each party would be governed by the first agreement subject to the reduction referred to. Assuming as we must, under the decisions referred to, that the original agreement, under the findings of the referee, must be regarded as a Wisconsin contract, and therefore valid, unless in violation of the statute of frauds of that State, I certainly do not see how any subsequent agreement could legally have been entered into in this State, which could have the effect claimed. Our statute declares that all "contracts or agreements relating" to the sale of liquors shall be utterly null and void. Under this statute the subsequent agreement entered into between plaintiffs' agent and defendant in Grand Rapids, in relation to a reduction in price, may be treated as a nullity, thus leaving the original agreement in full force and unmodified. An agreement which the statute then in force declared to be null and void could not destroy, change or affect a previous valid agreement between the same parties.

This being a Wisconsin contract, was there an acceptance of the goods in compliance with the statute of frauds of that State? The statute of Wisconsin declares such a sale void, unless 2d, "the buyer shall accept and receive part of said goods, or the evidences or some of them of such things in action." By the terms of the agreement the goods were to be shipped by plaintiffs at Milwaukee, to Grand Rapids by boat, and at defendant's risk, he to pay freight. The goods were so shipped about the 11th of February, and received by defendant somewhere from the 12th to the 15th of the same month. A delivery to the carrier in Milwaukee would not, we think, take the case out of the statute, within the decisions heretofore made by this court. *Grimes v. Van Vechten*, 20 Mich. 412; *Webber v. Howe*, 36 id. 154. An acceptance by the buyer was necessary. Under the finding of the referee there can be no question as to the fact of an acceptance by the buyer at Grand Rapids. That such an accept-

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ance would be good and sufficient to bind the defendant there could be no question, unless it can be said that until acceptance there was no contract; that the acceptance having been made in Grand Rapids the contract must be considered as having been then and there made, and consequently void under the statute of this State which prohibited such agreements.

For my own part I am not quite prepared so to hold. Were it not for the Wisconsin statute of frauds there could be no question as to the validity of this contract, and I do not clearly see how the time and place of the acceptance can, under such circumstances, be considered as the time and place of the agreement. A majority of the court is however of a different opinion, and consider that there was no binding agreement until an acceptance by the purchaser of the goods in Michigan, which made the contract a Michigan one and therefore void under the prohibitory liquor law, so called, then in force.

Under those circumstances the judgment will be reversed, and judgment entered for defendant with costs of both courts.

GRAVES, J. Unless before the liquors passed the line of Wisconsin the circumstances were sufficient to establish a binding sale there, the judgment cannot be maintained. What are the facts as ascertained by the finding of the learned referee? At Grand Rapids in this State the defendant ordered of Rindskopf Bros. at Milwaukee, in the State of Wisconsin, a bill of liquors, but under the condition that the liquors should be sent to be first examined and then to be kept or returned as it should or should not appear that they answered the requirements of the understanding under which the order was made. Rindskopf Bros. at Milwaukee acceded to the terms of the order, and there acting upon them handed over to a carrier a lot of liquors to be transported to defendant at Grand Rapids. All further dealings were in Michigan. There was neither note nor memorandum in writing, nor payment of any purchase-money. Was there any receipt or acceptance in Wisconsin in the sense of the statute of frauds? Unless there was, no binding sale was there effected. And I think the finding answers the question in the negative. The only act of receipt and acceptance in Wisconsin was by the carrier, and according to the finding that was under and expressly subject to an arrangement which forbids inferring from it a receipt and acceptance as elements of a present sale.

The reported facts distinctly show that his connection with the liquors could have no such meaning. He received them simply for carriage to Michigan, and in order that they might upon arrival be examined, with a view to their change of ownership here upon terms already agreed on, if found to correspond with the previous understanding. They were not yet the property of defendant and might never be. They passed the line of Wisconsin in the ownership of plaintiffs in order that they might be inspected, and might thereafter vest in defendant, if at all. The reception and assumption of custody by the carrier in Milwaukee for the special object found, was not of force to work a binding transfer in Wisconsin and make out an obligatory sale there against their statute of frauds. Benjamin on Sales [2d Eng., 1st Am. ed.] part II, ch. 4 and notes; *Stone v. Browning*, 68 N. Y. 598; *Caulkins v. Hellman*, 47 id. 449; s. c., 7 Am. Rep. 461, and cases in brief; *Meredith v. Meigh*, 22 Eng. L. & Eq. 91; *Knight v. Mann*, 120 Mass. 219: s. c., 118 id. 143; *Grimes v. Van Vechten*, 20 Mich. 410; *Hunt v. Hecht*, 20 Eng. L. & Eq. 524; *Frostburg Mining Co. v. New England Glass Co.*, 9 Cush. 115; *Farina v. Home*, 16 M. & W., 119.

Judgment reversed.

CAMPBELL, C. J., and COOLEY, J., concurred.

PEOPLE V. BRINGARD.

(30 Mich. 22.)

Criminal law — embezzlement — town treasurer.

It is embezzlement for a town treasurer to appropriate trust funds to private purposes and refuse to account for them, although he is not bound by law to pay over the identical money received.

CONVICTION of embezzlement. The opinion states the facts.

Otto Kirchner, attorney-general, for the people.

Hawley & Firnane, for respondent. Where a receiver of money belonging to another is absolutely liable for the amount of it, and

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has the right to mingle it with his own, he cannot be guilty of embezzlement. *Com. v. Stearns*, 2 Metc. 343 ; *Com. v. Libbey*, 11 id. 64.

CAMPBELL, C. J. Respondent was convicted of embezzlement of the funds in his hands as treasurer of the township of Grosse Pointe. His last term of office began in the spring of 1876. There was evidence tending to show that he was removed from office in February, 1877, but the finding of the jury did not go upon this theory, and he was convicted of having received a large sum of money, officially, and having refused to pay it over as required by law, and with having appropriated it to his own use.

There was full evidence of the receipt of the money, and of his having failed to appear and account with the township board before the annual meeting, as required by section 715 of the Compiled Laws, and he paid over no moneys to his successor.

[Omitting minor points.]

The main question presented is whether a township treasurer can be guilty of embezzlement at all.

We think there is no doubt that section 309 and section 7580 of the Compiled Laws hold such officers responsible for embezzling public moneys or property in their charge. The only question is whether the respondent did embezzle public moneys or property.

It is claimed the moneys in his charge were private and not public funds, and that he is only civilly responsible to account for funds in his control as a public debtor, and the case of *Perley v. County of Muskegon*, 32 Mich. 132; s. c., 20 Am. Rep. 637, is relied on to support this theory. In that case it was held that the county treasurer who receives public money does not hold the specific bills or other parcels of money which he receives, as a bailee, but that he is answerable for the amount as a personal obligation. And it is claimed embezzlement can only be charged where the specific moneys converted belong to the public treasury.

We do not see the force of this suggestion. A fund is a distinct thing, however frequently the coins or bills which may be received on its account are changed in identity. If a trustee receives a payment of \$1,000 on trust account, certainly the trust is not confined to that identical money. It attends its proceeds in whatever way they can be traced. It would be simply impossible to trace or identify the specific moneys which come into the hands of a public

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officer, who alone has the means of knowing what particular payments he receives and what he does with them. If a person receives a particular amount belonging to a trust fund, and uses it for his own purposes without repaying or accounting for it, no one has any difficulty in seeing that he has converted the money improperly, although every specific coin or bill may have been substituted for some other means which he has exchanged and abstracted. Some of the difficulties of confining charges of embezzlement to specific moneys were referred to in the case of *People v. McKinney*, 10 Mich. 54. We have no hesitation in holding that whenever any township treasurer misappropriates his trust funds to his private purposes, and fraudulently refuses to account for them, he comes as plainly within the law as if he made a similar misuse of specific coins or bills which he had no right to exchange for their equivalents. Of course there may be losses and failures to pay or even to account, where the failure is due to misfortune or other cause not criminal. But where the design is criminal, the misuse of a fund belonging to the public, though changing its form constantly, is just as clearly an embezzlement of the property of the public as if any specific chattel had been so misapplied.

As there is no error in the record, it must be certified to the court below that judgment should be rendered on the verdict.

Judgment accordingly.

The other justices concurred.

MCFARLANE V. CLARK.

(39 Mich. 44.)

Jurisdiction — interest — probate judge named as legatee, to prove will.

A probate judge named as legatee may lawfully make the orders of hearing and notice for proof of the will, the statute incapacitating him only from acting in the decision of the question.

EJECTMENT. The opinion states the facts. The defendant had judgment below.

Henry M. Duffield, for plaintiff in error. When a probate judge is made a legatee he cannot exercise the duties of his office in rela-

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tion to the estate. *Coffin v. Cottle*, 9 Pick. 287; *Sigourney v. Sibley*, 21 id. 101; 22 id. 507; *Northampton v. Smith*, 11 Metc. 395; *Cottle's case*, 5 Pick. 483; *Gay v. Minot*, 3 Cush. 352; *Bacon, Appellant*, 7 Gray, 391; *Hawley v. Baldwin*, 19 Conn. 585; *Nettleton's Appeal*, 28 id. 268; *Cabot Bank Appeal*, 26 id. 7; *Wilson v. Wilson*, 36 Ala. 655; *Claunch v. Castleberry*, 23 id. 85; *Heydenfeldt v. Towns*, 27 id. 423.

Ashley Pond, for defendant in error.

COOLEY, J. But one question is presented by this record, and that is, whether the probate and allowance of the will of George Hebden by the probate court of Wayne county was valid.

By the will of Mr. Hebden the judge of probate of Wayne county was made a legatee. The will was presented in said probate court for allowance April 7, 1871, and the judge of probate made an order that May 2, 1871, be assigned for a hearing thereon, and that notice thereof be given by publication in one of the Detroit daily papers — which was named — for three successive weeks previous to said day of hearing. On the day last named the Circuit judge of the judicial circuit embracing Wayne county appeared in said probate court, and the hearing was had before him and the will admitted to probate. This statement sufficiently presents the facts.

The order for hearing which was made by the judge of probate was the usual order which the statute requires to be made in such cases. Comp. L., § 4338. The statute under which the Circuit judge assumed jurisdiction is embraced in compiler's sections 5208 and 5209 of the Compiled Laws, the first of which provides that when the judge of probate is heir or legatee, he shall be deemed incapacitated for executing the duties of his office "in relation to that estate;" and the second provides that when he is interested in any question to be decided by the court, he shall be deemed incapacitated for acting in the decision of that question. And in either case the judge of the Circuit Court for the county shall perform the duties of the judge of probate.

The question of jurisdiction which is made by the plaintiff in error depends upon the authority of the judge of probate to make as he did the order for hearing. It is insisted that that order was void, and therefore that the proceedings of the Circuit judge must fall to the ground.

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The proceedings in our opinion are not defective. The judge of probate was not a legatee at the time he made the order for hearing; he was only named legatee in an instrument purporting to be a will, but the validity of which was yet to be determined. It might turn out that it was no will at all, and thus he would never become legatee. His being named legatee in the instrument did not, therefore, disqualify him from acting in relation to that estate.

Neither, when the order for notice was made by him, was there any question to be decided by the judge in which he was interested. A question implies something in controversy, or which may be the subject of controversy; but this order was the determination of no question; it was only preliminary to the making of questions. It was in no proper sense judicial action at all, any more than it is when the sheriff fixes the time for an execution sale and the paper in which he will publish his notice, or when the mortgagee does the same thing in proceeding to the foreclosure of his mortgage under the power of sale. The statute itself determined the requisites of the order, and the making it was a formality, rather than the decision of a question.

The fact that the judge is interested is no objection to his making formal orders that put the case on the road to a determination. *Richardson v. Boston*, 1 Curt. C. C. 251; *Washington Ins. Co. v. Price*, Hopk. Ch. 2; *Buckingham v. Davis*, 9 Md. 324; *Heydenfeldt v. Towns*, 27 Ala. 423. We think the order in question is to be considered such an order.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

BROCKWAY V. INNES.

(39 Mich. 47.)

Statutory construction — "laborer" — liability of stockholders for debt of.

An assistant chief engineer of a railroad company is not a "laborer" within the meaning of provisions rendering the stockholders of corporations liable for labor debts. (*See note, p. 350.*)

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SUIT against a stockholder for a labor debt. The opinion states the case. The plaintiff had judgment below.

Isaac M. Crane and *E. W. Meddaugh*, for plaintiff in error. The services of an assistant chief engineer are not within the meaning of the word "labor" in Constitution, art. XV, § 7, and Comp. L., § 2308. See *Boutwell v. Townsend*, 37 Barb. 205; *Harrod v. Hamer*, 32 Wis. 162; *Hovey v. Ten Broeck*, 3 Rob. 316; *Coffin v. Reynolds*, 37 N. Y. 640; *Aikin v. Wasson*, 24 id. 482; *Ericsson v. Brown*, 38 Barb. 390; *Wentroth's Appeal*, 83 Penn. St. 469; *Penn. R. R. v. Leuffer*, 84 id. 168; s. c., 24 Am. Rep. 189; 17 Am. L. Reg. 102.

R. A. Parker and *Ashley Pond*, for defendant in error.

CAMPBELL, C. J. Innes sued Brockway, who was a stockholder in the Amboy, Lansing & Traverse Bay railroad, for what he claimed to be a debt for labor performed for that company.

The plaintiff below was assistant chief engineer of the road. It is claimed by plaintiff in error that the exceptional liability provided by the Constitution and statutes against corporation stockholders for "labor performed for such corporation" does not include such services as those of Innes.

We think this objection is well taken. The Constitution evidently intended to protect those persons who most needed protection and who would be most likely to suffer without it. No doubt the term "labor," in some extended senses, will include every possible human exertion, mental and physical, and in that broad signification it would be hard to find any case which would not come within the law. But inasmuch as the provision is manifestly designed to be exceptional, we must apply to it the ordinary meaning which is in common use, and which it must be presumed the people understood when they voted on the Constitution. Doubtless the precise line between what is commonly called labor, and other employment, cannot be drawn with absolute precision. But we feel very sure that the position of an assistant chief engineer would never have been classed as that of a laborer, nor his work as labor in the popular sense. It is mostly direction and scientific work, involving much more superintendence than personal exertion in manual labor. He is chosen for his knowledge

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and not for his muscular capacity, in which latter quality he may or may not be eminent.

We can get little aid from authority on any such question. It is not to be decided upon verbal niceties or far-fetched reasoning. We are bound to construe the provision as the ordinary meaning of language would define it, and no extended argument can make it plainer than the words themselves. In our opinion the provision is not ambiguous as applicable to such an employment as that of the plaintiff below.

Judgment must be reversed with costs of both courts.

Judgment reversed.

The other justices concurred.

NOTE BY THE REPORTER.—See *Stryker v. Cassidy*, 76 N. Y. 50; s. c., 32 Am. Rep. 262, and note, 264; also *Whittaker v. Smith*, 81 N. C. 340; s. c., 31 Am. Rep. 553. The same was held of a contractor for building a bed for a railway. *Peck v. Müller*, 39 Mich. 594. In the latter case the court said:

“There can be no doubt, we think, that the main if not the only object of this provision was to secure the claims of laborers whose wages are not usually very large, but whose means are not generally such that they can avoid suffering unless they are secured. Such persons have not the same knowledge of business or command of resources as contractors, and they are much less able to protect themselves in advance by proper measures of precaution against loss. There is nothing in the proceedings of the constitutional convention to indicate from what source the provision was borrowed. The general railroad law of New York, which had then been recently adopted, contained a clause enforcing liability ‘for all the debts due or owing to any of its laborers and servants for services performed for such corporation,’ and this has been held not to extend to the contractor for building a portion of a railroad. *Atken v. Wasson*, 24 N. Y. 482. The natural meaning of the provision in question is that the work must be performed for the company, and create a company liability to the person who performs it. If the labor is not performed for the company but for some one else with whom the company is in contract relations, it requires some expansion of the language to reach the middleman, and this would not be allowable unless upon plain evidence of such an intent. Courts cannot enlarge the liability of sureties beyond the plain terms of their suretyship.

“It does not necessarily follow that there can be no liability for labor to a person who in performing a labor service employs his own assistants and workmen. There are certainly very many cases where the work which is done by a contractor is labor in the proper sense of the term and is so understood. There are undoubtedly cases where the line may not be easily drawn. But in such a case as the present there is no difficulty. These contractors were to go upon the line of the proposed railway, and transform a certain section of it into the structure of a track, clearing away trees and stumps, raising an embankment, building bridges and culverts, piling low land, and laying timber and ties where they belong, and turning over to the railway company, ready for the finishing additions, something which was the result of combined skill, labor and materials, as distinct in its character as a building. The value of such a structure cannot be nicely analyzed into so many days’ work or so much material. The contractors make their own bargains with their men, and for their material, and include in their prices such profits as they can induce the company to give, and which will make the undertaking remunerative for their time, expenditure, risk, and any other element which they suppose included. To call the completion of such a contract labor done or materials furnished for the company would be to leave out the important element of a complete result which was the thing bargained for. If such a contract had been violated in any particular, the contractor could not recover the full price of the

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rest and confine the damages to the one item left out or spoiled. Putting in weak timbers, endangering a bridge, might easily involve very much more than the additional cost of a few feet of sound timber. The effect of the failure on the entire work might be considerable, and could not be apportioned indefinitely among the separate items of labor, time or materials. And where suit is brought on such a contract and judgment recovered for less than its face, or for its whole face, any attempt to determine what part is for labor and what part for something else may be impossible. It cannot reasonably be said that the men who work for such a contractor are performing labor for the company, and it is very certain that the contractor is himself doing something quite different. The same legislature which adopted the statute of 1871 recognized the difference by making special provision whereby railroad companies may be required to protect the wages of men employed by contractors or furnishing them material. Comp. L., §§ 2898-4-5. This law is copied from a New York law forming part of the same general system under which contractors were held not entitled to look to stockholders. *Kent v. N. Y. Central R. R.*, 12 N. Y. 628.

"If railroads were the only corporations, and if railroad construction were the only kind of labor contemplated by the Constitution, there would be more force in the suggestion that the majority of labor is left unprovided for by this construction. There is no reason to suppose railroads were particularly in the mind of the convention. At that particular time it is very certain they had given no occasion for the protection of contractors. But it is plain enough that the provision was intended to cover completed as well as inchoate enterprises, when corporations would have less occasion to make contracts than to employ men. There is no branch of business which is not more or less done by companies, from mines and manufactories of all sorts, large and small, to transportation by land and water, farming, building, lumbering and numberless other enterprises. More persons labor for companies than for individual employers in many parts of the country, and experience has always shown these laborers, properly so called, are very much at the mercy of employers and need protection against corporate irresponsibility."

GIBSON V. CRANAGE.

(29 Mich. 40.)

Contract — to "satisfaction."

A contract for a portrait to be "satisfactory" to the customer gives him the option of refusing it at his pleasure. (*See note, p. 853.*)

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Shepard & Lyon, for plaintiff in error.

Scotfield & Webster, for defendant in error.

MARSTON, J. Plaintiff in error brought assumpsit to recover the contract price for the making and execution of a portrait of the deceased daughter of defendant. It appeared from the testimony

of the plaintiff that he at a certain time called upon the defendant and solicited the privilege of making an enlarged picture of his deceased daughter. Ho says, "I was to make an enlarged picture that he would like, a large one from a small one, and one that he would like and recognize as a good picture of his little girl, and he was to pay me."

The defendant testified that the plaintiff was to take the small photograph and send it away to be finished, "and when returned if it was not perfectly satisfactory to me in every particular, I need not take it or pay for it. I still objected, and he urged me to do so. There was no risk about it; if it was not perfectly satisfactory to me I need not take it or pay for it."

There was little if any dispute as to what the agreement was. After the picture was finished it was shown to defendant who was dissatisfied with it and refused to accept it. Plaintiff endeavored to ascertain what the objections were, but says he was unable to ascertain clearly, and he then sent the picture away to the artist to have it changed.

On the next day he received a letter from defendant reciting the original agreement, stating that the picture shown him the previous day was not satisfactory and that he declined to take it or any other similar picture, and countermanded the order. A farther correspondence was had, but it was not very material and did not change the aspect of the case. When the picture was afterward received by the plaintiff from the artist, he went to see defendant and to have him examine it. This defendant declined to do, or to look at it, and did not until during the trial, when he examined and found the same objections still existing.

We do not consider it necessary to examine the charge in detail, as we are satisfied it was as favorable to plaintiff as the agreement would warrant.

The contract (if it can be considered such) was an express one. The plaintiff agreed that the picture when finished should be satisfactory to the defendant, and his own evidence showed that the contract in this important particular had not been performed. It may be that the picture was an excellent one and that the defendant ought to have been satisfied with it and accepted it, but under the agreement the defendant was the only person who had the right to decide this question. Where parties thus deliberately enter into an agreement which violates no rule of public policy, and

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which is free from all taint of fraud or mistake, there is no hardship whatever in holding them bound by it.

Artists or third parties might consider a portrait an excellent one, and yet it prove very unsatisfactory to the person who had ordered it, and who might be unable to point out with clearness or certainty the defects or objections. And if the person giving the order stipulates that the portrait when finished must be satisfactory to him or else he will not accept or pay for it, and this is agreed to, he may insist upon his right as given him by the contract. *McCarren v. McNulty*, 7 Gray, 141; *Brown v. Foster*, 113 Mass. 136; s. c., 18 Am. Rep. 465.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

NOTE BY THE REPORTER.—As to a contract for a "satisfactory suit" of clothes, see *Brown v. Foster*, 113 Mass. 136; s. c., 18 Am. Rep. 465; for a "satisfactory bust," *Zaleski v. Clark*, 44 Conn. 318; s. c., 26 Am. Rep. 446.

Where a party contracts to do work to the satisfaction of a third person, in an action to recover the stipulated price he must aver and prove that the work was done to the satisfaction of such person. *Butler v. Tucker*, 24 Wend. 447; *Barton v. Hermann*, 11 Abb. Pr. (N. S.) 387.

In *Tyler v. Ames*, 6 Lans. 280, it was held that a contract to employ an agent for a year, if he "could fill the place satisfactorily," may be terminated by the employer when in his judgment the agent fails to meet that requirement of the contract. The court said: "The word 'satisfactorily' refers to the mental condition of the employer, and not the mental condition of a court or jury. The right of determining whether the plaintiff filled the place of agent satisfactorily must, from the nature and necessity of the case, belong to the person whose interests are directly affected by the plaintiff's action. To require the employer, under such a contract, to prove that plaintiff did not fill the place satisfactorily would be to require of him an impossibility, unless his own oath was taken as to his mental status on the subject. If he is required to prove facts and circumstances that would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as without such a clause he would have the right to dismiss the plaintiff if he did not properly perform his duties. The question is quite similar to the one that is sometimes raised on chattel mortgages, containing a clause authorizing the mortgagee to take the property and sell it when he deems himself insecure. The weight of authority is in favor of the right of the mortgagor to take and sell the property without any obligation to prove that the facts and circumstances surrounding the parties justified him in deeming himself insecure. *Huggans v. Fryer*, 1 Lans. 276; *Chadwick v. Lamb*, 29 Barb. 518; *Rich v. Mills*, 30 id. 616; *Hall v. Sampson*, 19 How. Pr. 481; *Farrell v. Hildreth*, 38 Barb. 178." To same effect, *Olne v. Libbey*, 46 Wis. 123; s. c., 23 Am. Rep. 780.

In *McCarren v. McNulty*, 7 Gray, 139, the same doctrine was held as to a contract to make a book-case, of a certain kind and of certain dimensions, "in a good, strong and workmanlike manner, to the satisfaction" of one of the defendants. The court said: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor or furnish materials for a compensation the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief. Having voluntarily assumed the obligations

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and the risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions."

In *Hart v. Hart*, 32 Barb. 606, a son agreed to support and maintain his father during his life and covenanted that if at any time the father should become dissatisfied with living with him, the son would pay his board. *Held*, that the father had a right to quit the family of his son whenever he became dissatisfied, without showing a good excuse for leaving, and that it was for him to judge whether there was good cause for dissatisfaction. The court said: "It is a case where the law will not undertake to say for the party he must be satisfied and has no right to be dissatisfied with living in this family; for the party by the express terms of the contract has made his own feelings the sole judge of the matter. Contentment and satisfaction with a man's position in a particular family is a matter which the law will not assume to determine for him. Neither will it do the converse, and say he had no cause to be discontented and dissatisfied, and therefore he cannot be regarded as dissatisfied."

There are a few cases that look in the opposite direction:

In *Wetterwulph v. Knickerbocker Building Association*, 2 Bosw. 381, the defendant's articles provided that in case any member, by sickness, removal or misfortune, become unable to pay his dues, he might withdraw, "and in case the board of trustees are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party into the association shall be returned." *Held*, that the plaintiff was entitled to withdraw and a return of his money, if he showed such facts as in law and in good conscience ought to have satisfied the trustees.

In *Manufacturing Company v. Brush*, 43 Vt. 528, the action was founded upon a contract between the plaintiff and the defendant, by which the defendant was to take a sugar evaporator of the plaintiff upon trial, and pay for it if he liked it, the plaintiff to take it back if he did not like it. The court said: "The trial upon which the defendant took the evaporator was to be had for the purpose of ascertaining whether the defendant liked it or not, and not for the purpose of ascertaining whether it was equal to the plaintiff's recommendations of it or not. The trial was to be had solely with reference to the defendant's wishes in respect to the machine for such uses as he might find he could make of it and not with reference to any usefulness of it to other persons. To this trial the defendant was bound to bring honesty of purpose; any thing short of that would not determine his wishes fairly, but only his willful caprice or his dishonorable design. To it he was not bound to bring any more capacity or judgment than he had, for he was only to ascertain his own wishes, and these could be measured by no judgment or capacity but his own. He was not to determine what would be the wishes of ordinary persons under like circumstances, and therefore was not bound to use the care and skill of ordinary persons in making the determination. His duty to the evaporator, as custodian of it, is not now here in question but only his duty and liability under the contract concerning it. This duty was the trial of it, and payment for it, if on trial of it he liked it. To the trial the charge of the court required him to bring honesty of purpose and judgment according to his capacity to ascertain his own wishes, and refused to require the care and skill of ordinary persons in making that determination. This seems to have been correct."

Daggett v. Johnson, 49 Vt. 345, was an action for the price of milk pans. The court said: "The contract of the defendant requested plaintiffs to deliver the pans to the defendant, and he agreed to pay them therefor \$80 on the first of July, 'if satisfied with the pans.' We think the ruling of the court, that the defendant had no right to say, arbitrarily, and without cause, that he was dissatisfied, and would not pay for the pans, was sensible and sound. The pans were made with appliances to graduate the temperature of the milk by running water; and in that consisted their excellence. Without these, they were like other pans, save their greater capacity. All this the defendant well knew. If a man orders a garment made of given material and fashion, and promises to pay if satisfied, he cannot say that the garment in material and manufacture is according to the order, and yet refuse to test the fit or pay for it. He must act honestly, and in accordance with the reasonable expectations of the seller, as implied from the contract, its subject-matter and surrounding circumstances. His dissatisfaction must be actual, not feigned; real, not merely pretended. *Manufacturing Co. v. Brush*, 43 Vt. 528."

WHEELER V. CONSTANTINE.

(30 Mich. 62.)

Contract — place of — validity presumed.

A note valid in Michigan is there presumed valid in Indiana; and if an Indiana woman pleads her disqualification to make a note given by her for goods purchased by her in Michigan, she must support it by proof of the Indiana law.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Walker & Weaver, for plaintiff in error. The notes of a married woman domiciled in Indiana are void (*Coats v. McKee*, 26 Ind. 223; *O'Daily v. Morris*, 31 id. 111; *Kantrowitz v. Prather*, id. 92; *Higgins v. Willis*, 35 id. 371; *Hasheagen v. Specker*, 36 id. 413; *Jenkins v. Flinn*, 37 id. 349; *Hodson v. Davis*, 43 id. 258; *Brick v. Scott*, 47 id. 299); even though payable in Michigan (Story's Conf. of Laws, 66); and are void everywhere (*Martin v. Dwelly*, 6 Wend. 13; *Garnier v. Poydras*, 13 La. 177; *Wilder's Succession*, 22 La. Ann. 219; 2 Am. Rep. 721; *Hyde v. Goodnow*, 3 Comst. 267; *Elliott v. Peirsol*, 1 Pet. 338; *Tucker v. Moreland*, 10 id. 71; 2 Kent's Com., § 31); nor could she authorize an agent to make notes. *Webber v. Howe*, 36 Mich. 150; s. c., 24 Am. Rep. 590; *Armitage v. Widoe*, id. 124.

Stacy & Underwood, for defendant in error.

CAMPBELL, C. J. In this case plaintiff in error claims freedom from liability on certain notes made by her for goods purchased, because she insists that as a married woman, residing in Indiana, she was disqualified from contracting in Michigan or elsewhere in that way.

We do not find in the record any evidence that the laws of Indiana, disqualify her. If any such laws exist they should have been proven in the Circuit Court. We can only review such matters as that court has acted on, and we cannot reverse a judgment upon grounds not based on evidence introduced below. We cannot presume that

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there was any thing which would make such notes void when our laws authorize them. *Worthington v. Hanna*, 23 Mich. 530.

We do not wish to be understood as intimating that our laws would not govern these notes at any rate, as made in Michigan. That point we do not decide because it is not required by the record.

Judgment is affirmed with costs.

Judgment affirmed.

The other justices concurred.

 BULLOCK V. TAYLOR.

(30 Mich. 137.)

Negotiable instrument — provision for attorney's fee.

A provision in a note for an attorney's fee in case of proceedings to collect is void.*

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

John D. Conley, for plaintiff in error.

Spaulding & Cranson, for defendants in error.

COOLEY, J. The action in this case is brought to recover from William Taylor and Aaron B. Taylor as principals, and Joseph K. Taylor as surety, the amount of several promissory notes given by the principals, and for the payment of which the surety is supposed to have bound himself by a bond executed before the notes were given.

The notes were given in pursuance of a certain agreement under which William and Aaron B. Taylor became agents for the plaintiff in the sale of musical instruments. They also agreed to buy certain instruments, and to "execute and deliver to said Bullock their equal promissory notes, executed by them and payable to his

* To same effect, *Witherspoon v. Musselman* (14 Bush, 214), 29 Am. Rep. 404, and note, 403. *Contra*, *Miner v. Paris Ex. Bank*, Texas Sup. Ct., 1880.

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order for the full amount of the aggregate prices of said instruments, * * and that said note shall be due and payable at Second National Bank of East Saginaw, Michigan, in three equal installments of six, nine and twelve months from the date of each delivery of said instruments, with interest thereon at the rate of ten per cent per annum, from the date of each of said notes." The bond signed by Joseph K. Taylor was conditioned for the performance by his principals of the stipulations of his agreement.

The question in the case arises on the notes which were afterward given. The following is a copy of one of them :

" \$70.83.

MT. PLEASANT, *April* 12, 1875.

Nine months after date we promise to pay to R. D. Bullock or order the sum of seventy 83-100 dollars value received, with ten per cent interest, with current exchange or express charges. If this note is not paid at maturity it is to draw ten per cent from date, and the undersigned agree to pay fifteen dollars attorney's fees, over and above all taxable costs, should any proceedings be instituted to collect this note, payable at Second National Bank, East Saginaw.

WM. TAYLOR & Co."

The surety insists that such notes are not within the terms of his undertaking ; first, because they contain a promise to pay exchange or express charges in addition to the sum owing; second, because they provide for the payment of an attorney's fee, to which he has never consented; and third, because being for the payment of uncertain sums, they are not promissory notes at all.

We quite agree with counsel for the plaintiff that the provision for the payment of exchange or express charges is merely nugatory. By the agreement as well as by the terms of the notes, they were made payable at East Saginaw, and it therefore became the duty of the promisors to be at any expense necessary in the transmission of the money to that place. Whether they sent by draft or by express the expense would equally fall upon them, and an express promise to pay it could add nothing to their liability. The provision on the subject may have been inserted in the notes for a more perfect understanding of the agreement, but the surety could not complain of it, because it could not in any manner add to his liability, or vary his undertaking.

The agreement embodied in some of the notes for the payment by the makers of an attorney's fee, in case any proceedings are instituted for collection, presents a somewhat different question. If the agreement is valid and constitutes a part of the obligation of the makers upon which a recovery may be had in a suit for the amount owing on the note, then it will be conceded the notes which contain it are not within the terms of the obligation the surety has assumed. The surety undertook for the payment of the price of goods to be sold, and not for any penalty for failure to pay promptly; and his promise cannot be enlarged in the slightest particular without his consent. *Smith v. Sheldon*, 35 Mich. 42. It is suggested, however, — and there is some authority for that view — that the provision for the payment of an attorney's fee is only the personal undertaking of the makers, which from its very terms does not become operative until suit brought, and consequently cannot be counted upon in the suit for collection of the note, and is no more a part of the obligation for which the surety has undertaken than if it were a promise evidenced by a separate instrument. A more important suggestion is, that the promise is absolutely void.

In this State the attorney's fees which the successful party is permitted to recover in courts of record are prescribed by statute or by rule of court. In justices' courts none are given, except in a few special cases. The policy of our law is to limit such recovery to a very moderate sum in every case where it is permitted at all. We have also in this State had usury laws from the very first; and though their penalties have not been severe, they have fixed a maximum of ten per centum per annum, which is not to be exceeded under any circumstances. And it is a question of very grave importance whether the policy which thus limits attorney's fees and also limits the rates of interest can be set aside by provisions like that under review.

The notes upon which a recovery is sought in this case vary in amount from \$41.50 to \$104.12. Six of them, including two for \$41.50 each, contain the promise to pay an attorney's fee of fifteen dollars, should any proceedings be instituted for collection. All of them could be sued in justice's court and the mere taking out of a summons would be a proceeding for collection. Therefore the makers are made to promise that if the payee, when the notes come due and are not paid, shall take out a summons upon each of them, the makers will pay an attorney's fee of fifteen dollars upon each.

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It is of course preposterous to call this a fee; a fee supposes services, and here the services to be compensated may be purely nominal. The sum is nothing but a penalty, it cannot even be regarded as stipulated damages on a default; for the sum to be paid bears no proportion to the sums overdue, but is the same for the smallest notes as for the largest. Moreover, the law itself determines what shall be the recoverable damages on default in the payment of a liquidated demand, and limits it to a sum not to exceed ten per centum per annum, while these stipulations in some cases provided for the payment of a sum equal to thirty-five per centum, however brief might be the period of default.

A stipulation for such a penalty we think must be held void. It is opposed to the policy of our laws concerning attorney's fees and it is susceptible of being made the instrument of the most grievous wrong and oppression. It would be idle to limit interest to a certain rate, if under another name forfeitures may be imposed to an amount without limit. The provision in these notes is as much void as it would have been had it called the sum imposed by its true name of penalty or forfeiture. There is no consideration whatever that can support it.

It follows that the Circuit Court should have rendered judgment for the amount of the notes, ignoring this provision. The judgment must be reversed with costs, and a new trial ordered.

Judgment reversed.

The other justices concurred.

LIDDLE V. NEEDHAM.

(39 Mich. 147.)

Statute of frauds — promise to pay for lands to be deeded to another.

An oral agreement by A with B to pay for land to be deeded by him to C is void, although B deeds the land accordingly.

ASSUMPSIT. The opinion states the facts. The plaintiff had judgment below.

H. H. Riley, for plaintiff in error.

Jno. B. Shipman, for defendant in error.

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GRAVES, J. Needham recovered in the Circuit Court on a claim which grew out of a transaction between the parties in relation to the proposed transfer of a piece of land by Needham to Liddle's son, and Liddle has brought error. The declaration consisted of a special count setting up an express agreement, together with the usual general counts in assumpsit.

The cause of action asserted in the special count is that in consideration that Needham promised to give to Liddle's son, subject to the taxes of 1875, a warranty deed of certain land described, he, Liddle, promised to pay said taxes and give his note to Needham for \$300 payable in one year with interest at ten per cent; that he, Needham, gave the deed pursuant to the promise, but Liddle refused to pay the taxes or money or give the note. It will be observed that the agreement here set up was executory on both sides and that Liddle's promise is alleged to have been made in consideration of that by Needham.

The count does not describe Liddle's promise as made upon a past or executed consideration. The averment is not that he promised to pay taxes or give his note in consideration that Needham at his request had deeded to young Liddle. But the allegation is that in consideration of Needham's promise that he would thereafter deed, he, Liddle, promised that he would thereafter give his note, etc., and the object of the count is to compel Liddle to perform this promise.

There was evidence that these parties made a verbal agreement in terms substantially as charged; that Needham subsequently, and in compliance with the understanding, drew up a blank note and made the deed and sent them to young Liddle; that the elder Liddle refused to pay any thing or to give the note, and claimed that he was not bound. There was also evidence tending to show that the deed had never been accepted by young Liddle as a conveyance, and that he disclaimed title under it. The evidence was conclusive that the whole transaction was bare of writing except the deed and blank note, and that Liddle made no promise in terms at any time after the verbal bargain. The question was distinctly and fairly raised whether Liddle was or was not exempt from liability upon his executory promise by operation of the statute of frauds. He insisted that he was exempt, but the court ruled against him. We think the point is clear. The agreement was

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for the purchase and sale of land, and the want of writing was fatal. *Scott v. Bush*, 26 Mich. 418 ; s. c., 29 id. 523.

The agreement when made was without force. Neither party was bound by it. This direct infirmity due to the want of writing leads also to another objection. As Needham's promise to deed was not binding at all, Liddle's promise made entirely on the strength of it was not binding for lack of consideration. In order to make one promise a valid and binding consideration for another, it must itself be valid and binding. It is plain that no recovery was admissible under the special count.

Is the case in any better shape to justify recovery under the common counts ? The court think not. If there is any chance for contending for an actionable right in favor of any party under them, it must be by implying an undertaking from a proved acceptance of Needham's grant.

The case leaves no basis for any other theory. The door is closed against the existence of any tenable express promise. And if we assume that no technical difficulties exist, and concede as true what is strongly denied, that young Liddle actually accepted the deed as a conveyance, there being no pretense of acceptance through any other person, still the case must fail. The undertaking to be implied would have to be imputed to the recipient of the grant, young Liddle, and not to his father, who as to this matter is to be regarded as a stranger. The unwritten bargain being of no force to constitute a contract and create legal contract relations, cannot be resorted to as help in making out such a relation by implication. The only consequence of the attempt to imply a promise would therefore be to imply it as against a third person and indirectly negative the making of any promise by the party charged.

Inasmuch as the transaction had no legal validity, there was no ground of recovery, and the court erred in allowing it.

Judgment must be reversed with costs and a new trial granted.

Judgment reversed.

The other justices concurred.

KERR V. KINGSBURY.

(39 Mich. 150.)

Fixtures — trade — landlord and tenant — renewal of lease from new landlord

Erections made by a lessee on the leased property do not come within a subsequent mortgage of the premises, although the lessee neglects to remove them during the term and accepts a renewal of the lease from a new landlord.

FORECLOSURE. The defendant had judgment below. The opinion states the case.

S. C. Hinsdale, for complainants. Acceptance of a new lease implies the surrender of the old one (*Lyon v. Reed*, 13 M. & W. 285; *Davison v. Stanley*, 4 Burr. 2210; 2 Smith's Lead. Cas. [7th Am. ed.] 756; *Taylor's Land. & Ten.*, §§ 507, 512; *Jungerman v. Bovee*, 19 Cal. 354; *Van Rensselaer v. Penniman*, 6 Wend. 569; *Logan v. Anderson*, 2 Doug. [Mich.] 101; *Roberts on Frauds*, 254-6); and where the grantor of the premises is also their lessee, there is such unity of title that erections on the premises are included in a mortgage given by him (*Jones v. Detroit Chair Co.*, 38 Mich. 92; s. o., 31 Am. Rep. 314; *Gaskill v. Trainer*, 3 Cal. 334); acceptance of a new lease covering erections estops the lessees from questioning their landlord's title to them (*Bertram v. Cook*, 32 Mich. 518; *Tyler on Fixtures*, 442); a tenant must remove his erections while he is in possession (*id.* 452, § 551; *Thropp's Appeal*, 70 Penn St. 395; *Thomas v. Crout*, 5 Bush, 37); possession to operate as notice should be inconsistent with the possessor's title (*Jones on Mortgages*, § 600; *Staples v. Fenton*, 5 Hun, 172); trade fixtures are not removable by the mortgagor of the premises on which they stand. *Climie v. Wood*, 3 Exch. 260; *Cullwick v. Swindell*, 3 Eq. 249; *Holland v. Hodgson*, L. R., 7 C. P. 328; *Winslow v. Merch. Ins. Co.*, 4 Metc. 310; *Roberts v. Dauphin Deposit Bank*, 19 Penn. St. 75; *Burnside v. Twitchell*, 43 N. H. 390; *Pettengill v. Evans*, 5 id. 54; *Maples v. Millon*, 31 Conn. 598; *Arnold v. Crowder*, 81 Ill. 56; *Bliss v. Whitney*, 9 Allen, 114; *Laflin v. Griffiths*, 35 Barb. 58; *Jones on Mortgages*, § 681; *Tyler on Fixtures*, 620, 657-8; 1 Washb. Real Prop. 15; *Willard's Eq. Jur.* 377.

Blair, Eggleston, Kingsley & Kleinhans, for defendants.

Kerr v. Kingsbury.

COOLEY, J. The controversy in this case concerns certain buildings which are claimed by complainant under a real estate mortgage given March 13, 1874, by defendant Solomon O. Kingsbury, to their testator. The defendant Lyon, on the other hand, claims them as tenant's fixtures under a lease of the lands mortgaged.

The facts appear to be that the defendant S. O. Kingsbury, on the 25th day of January, 1871, being then the owner of certain premises situated on Calder and Almy streets in the city of Grand Rapids, leased the Calder street lots for ten years from June 1, 1871, to John S. Long and Samuel P. Bennett, constituting the copartnership of Long & Bennett, who took possession and occupied the same for the purposes of a coal and wood yard. The lease contained a provision allowing the lessees thirty days on its termination for the removal of the buildings they might erect. June 1, 1872, a further lease of a portion of the Almy street lots was made by Kingsbury to Long & Bennett, to terminate at the same time with the other, and containing a similar provision respecting the removal of buildings.

In September, 1873, S. O. Kingsbury purchased of Long his interest in the copartnership of Long & Bennett, and assumed his place in the business, which was thereafter carried on in the name of Kingsbury & Bennett. In February, 1874, S. O. Kingsbury conveyed all the lots on the two streets to Gaius P. Kingsbury. This conveyance does not seem to have been understood by the parties as a transfer to G. P. Kingsbury of any thing more than the fee subject to the leases, and the business of Kingsbury & Bennett went on as before. In March, 1874, the deed to G. P. Kingsbury in the mean time not having been recorded, S. O. Kingsbury gave to Henry A. Kerr, whom the complainants represent, the mortgage under which they claim. In January, 1876, G. P. Kingsbury gave to Kingsbury & Bennett a new lease of all the lots for five years and five months. This would make the lease terminate at the same time as the former leases, and upon the face of the transaction no reason appears for giving it, unless it was to obtain, for the purposes of the business the copartnership was engaged in, the lots on Almy street which were not covered by the second lease.

The buildings the right to which is in dispute in this case had all been put up as tenants' erections previous to the giving of the Kerr mortgage, and were occupied by the copartnership of Kingsbury & Bennett for the purposes of their business at that time.

That firm subsequently became insolvent and made an assignment for the benefit of their creditors to the defendant Lyon, who undertook to remove the buildings as personalty. It is not disputed that as between landlord and tenant the buildings would in general have been removable, but it is insisted that under the facts of this case they are covered by the lien of the real estate mortgage.

1. In brief the claim on the part of the complainants that when Kingsbury & Bennett, in January, 1876, accepted from G. P. Kingsbury a new lease, they in contemplation of law surrendered the existing leases, and not having asserted and exercised a right to remove the erections made previously, they thereby abandoned them to their landlord, and could not assert or transfer to any one else the right to remove them afterward. This is the principal question in the case.

The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all is based upon a corresponding rule of public policy, for the protection of the landlord, and which is, that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant. *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 M. & W. 14.

But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his be-

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fore. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: "If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterward bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord."

There are some authorities which lay down this doctrine. *Merritt v. Judd*, 14 Cal. 59, is directly in point. That case is decided in reliance upon previous decisions which do not appear to us to warrant it. *Fitzherbert v. Shaw*, 1 H. Bl. 258, was a case in which ejectment having been brought against the tenant, he entered into an agreement that judgment should be signed at a certain time with stay of execution for a period; and the decision that the tenant could not afterward remove fixtures was based upon the agreement. *Lyde v. Russell*, 1 B. & Ad. 394, only asserts the general rule that where the tenant surrenders possession without removing his fixtures he loses his right. *Thresher v. East London*, 2 B. & C. 608, was decided upon the construction of a covenant contained in the new lease, by which the tenant undertook to repair the erections and buildings, and at the end of the term the premises so repaired, etc., to leave and yield up, etc. *Shepard v. Spaulding*, 4 Metc. 416, has some apparent analogy to the present case, but it is only apparent. There the tenant surrendered to his landlord without removing the fixture in controversy, but undertook to assert the right under a lease made several years afterward, and which he took when he was as much a stranger to the premises as if he had never occupied them. It is manifest that none of these cases affords any support to the conclusion in *Merritt v. Judd*. And we have been unable to discover in *Landon v. Platt*, 34 Conn. 517; *Davis v. Moss*, 38 Penn. St. 346, or *Haflick v. Stober*, 11 Ohio (N. S.), 482, to which our attention is called in this case, any thing important to this discussion.

The case of *Loughran v. Ross*, 45 N. Y. 792; s. c., 6 Am. Rep. 173, is in accord with the case in California. In that case Mr. Justice ALLEN speaking for the majority of the court says: "In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new

tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises." This is perfectly true if the second lease includes the buildings; but unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion it ought not to be held to include them unless from the lease itself an understanding to that effect is plainly inferable.

In *Davis v. Moss*, 38 Penn. St. 346, 353, it is said by Mr. Justice WOODWARD that "if a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." This in our opinion is perfectly reasonable, and it is as applicable to other tenancies as it is to those from year to year which are implied from mere permissive holding over.

II. It is further insisted on the part of complainants that the right of the assignee of Kingsbury & Bennett to claim the buildings as fixtures cannot be asserted as against the mortgage given to Kerr, because the mortgagee had a right to assume, when he took the mortgage, that Kingsbury, the mortgagor, occupied the premises as owner of the fee merely, and was conveying to him by way of security every thing that as between mortgagor and mortgagee would pass as realty; in other words, that the possession of Kingsbury & Bennett was no notice to Kerr that rights in the buildings were claimed by them as tenants.

It is true as a general rule that the possession of a grantor or mortgagor is no notice to his grantee or mortgagee that he claims any rights in the premises as against the conveyance he gives. *Bloomer v. Henderson*, 8 Mich. 395; *Dawson v. Danbury Bank*, 15 id. 489. But here Bennett as well as Kingsbury was in possession, and Bennett's rights could not be taken away by any act of Kingsbury's. As to Bennett the buildings remained chattels, and it was the duty of Kerr to take notice of his rights. If he had done so and made the necessary inquiries, he would have ascertained that the buildings were personalty; for they could not be realty as to

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one interest and personalty as to another. *Adams v. Lee*, 31 Mich. 440.

We think the decree below was correct, and it must be affirmed with costs.

Decree affirmed.

The other justices concurred.

BAY COUNTY V. BRADLEY.

(39 Mich. 103.)

Municipal corporation — ejectment to remove obstructions from street.

A county cannot maintain ejectment to remove obstructions from land dedicated as a street, but held adversely.

EJECTMENT. The opinion states the facts. The defendant had judgment below.

Fatio Colt, T. A. E. Weadock and C. H. Denison, for plaintiff in error. The title of the county in public streets is considered in *People v. Beaubier*, 2 Doug. (Mich.) 256; and see *Wanzer v. Blanchard*, 3 Mich. 11; *Callaway County v. Nolley*, 31 Mo. 393; *Gwynne v. Cincinnati*, 2 Ohio, 25; but the public have only an easement (*Post v. Pearsall*, 22 Wend. 435; *Dovaston v. Payne*, 2 H. Bl. 527; 2 Smith's Lead. Cas. 199); the freehold continues in the original owner (*Peck v. Smith*, 1 Conn. 103); but when the land is platted the owner parts with all private interest in that portion set apart for public uses, except a reversionary interest (*Canal Trustees v. Havens*, 11 Ill. 554; *Gebhardt v. Reeves*, 75 id. 301; *Hunter v. Middleton*, 13 id. 50; *Kimball v. Kenosha*, 4 Wis. 321; *Belleville v. Stookey*, 23 Ill. 441; *Carter v. Chicago*, 57 id. 287; *Jacksonville v. Jacksonville Ry. Co.*, 67 id. 540; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Hughes v. R. R. Co.*, id. 261); in the case of a common-law dedication, the owner of the soil of the highway or street may maintain ejectment, though not entitled to exclusive possession, and recovers subject to the public easement (*Goodtitle v. Alker*, 1 Burr. 133; *Alden v. Murdock*, 13 Mass. 256; *Bolling v. Mayor*, 3

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Rand. 563; *Com. v. Peters*, 2 Mass. 125; *Perley v. Chandler*, 6 id. 456; *Stackpole v. Healy*, 16 id. 33; *Jackson v. Hathaway*, 15 Johns. 447; *Augusta v. Perkins*, 3 B. Monr. 443); a city may bring ejectment for lots dedicated by plat to church purposes (*Hannibal v. Draper*, 15 Mo. 634); or for a public square. *Winona v. Huff*, 11 Minn. 119; *Dummer v. Jersey City*, 20 N. J. Law, 86; *M. E. Church v. Hoboken*, 33 id. 13; *Hoboken Land Co. v. Hoboken*, 36 id. 540; *San Francisco v. Sullivan*, 50 Cal. 603; *Savannah v. Steamboat Co.*, Charlt. (Ga.) 342; *Com'rs v. Boyd*, 1 Ired. (Law) 194; *Klinkener v. School Directors*, 11 Penn. St. 444; *Alton v. Illinois Transportation Co.*, 12 Ill. 38; *Apalachicola v. Apalachicola Land Co.*, 9 Fla. 340.

Hatch & Cooley, for defendants in error.

GRAVES, J. This case presents the question whether under our existing system a county can maintain ejectment for a strip of land regularly devoted to public use for a street, by means of dedication pursuant to the statute (Laws of 1839, p. 162) and of acceptance by the proper authorities, where the defendant holds possession adverse to the public and creates obstructions.

An elaborate argument has been made to sustain the right of action; but we think the position is untenable. Many reasons against it are suggested to the mind, not necessary to be noticed.

In order to maintain ejectment in this State the plaintiff at the time of commencing suit must have "a valid subsisting interest in the premises claimed, and a right to recover the possession thereof," etc. Comp. Laws, § 6206. And it is not unworthy of notice that this provision concerning the necessity of a right of possession in the plaintiff accords with the maxim, that no one can recover in ejectment who would not be entitled to enter without action.

Now what is the position of the county as respects a strip of land dedicated to public use as a street under the statute?

It acquires no beneficial ownership of the land, and exercises no volition about the transfer. Willing or unwilling, the law vests it with nominal title. It does not accept and cannot refuse. It cannot grant or otherwise dispose of the premises, and has no voice concerning the use. It is powerless to shorten the continuance of the easement, but other agencies may at any time bring it to an end, and in case of that the law does not allow even this figment

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of ownership to remain. In such event what was in the county vests in others.

But whilst it does remain, it is expressly for public use and not for county use except as the county is part of the public. And the county cannot in the character of an artificial person — which is the character in which it sues — take or enter into actual possession without acting adversely to the lawful right of use, for in respect to the subject in question actual possession is use. The tenure of the county is therefore repugnant to a condition of the action.

Again, it may be questioned whether possession by an individual to the exclusion of use by the public can be held to be adverse to the county in any such sense as the theory of this form of action requires. So, too, it may be questioned whether the county can be said to have “a valid subsisting interest in the premises” within the meaning of the statute. But these points do not call for decision now.

The policy of the State has always favored specific methods for opening public streets and for keeping them clear of encroachments and obstructions, and in furtherance of it the legislature at the last session extended the equity jurisdiction of the Circuit Courts in express terms to a large class of interferences.

Ejectment has never been considered here as a proper remedy to put the public in possession of land appropriated for streets or to keep it clear of unauthorized impediments, and the legislature has never attempted to adapt the action to such occasions. No reference is intended, by what is said, to various holdings for specific local uses, and where an action by the county for possession would be in consonance with proprietary and municipal duty, and not incompatible with the nature of the tenure or the ordained mode of use.

The ruling of the Circuit judge that the action could not be maintained was correct, and the judgment must be affirmed with costs.

Judgment affirmed.

CAMPBELL, C. J., and COOLEY, J., concurred ; MARSTON, J., did not sit in this case.

LEONARD V. PHILLIPS.

(39 Mich. 182.)

Negotiable instrument — immaterial alteration — addition of "annually" to interest clause.

The addition of the word "annually" to the interest clause of a note payable in less than two years, is not a material alteration, as it does not require the payment of interest at the end of the year.

ACTION on notes. The opinion states the point. The defendant had judgment below.

G. Chase Godwin, for plaintiff.

Blair, Eggleston, Kingsley & Kleinhans, for defendants.

MARSTON, J. The important question in this case relates to an alleged material alteration of a promissory note given January 10th, 1869, payable on or before the 15th day of October, 1870, with interest at the rate of ten per cent, by adding thereto the word "annually."

Even if this word was added as claimed, it was not, we think, a material alteration. If with this word added, we give it a literal construction as claimed, and say that at the expiration of the first year interest thereon would be due and payable, interest for the remaining portion of the time for which the note was to run before becoming due would not be payable until the expiration of the second year, so that the second installment of interest would not become due at the time the principal did, but some months thereafter. So the note being payable on or before October, 15th, had it been paid within the first year, the accrued interest could not have been collected until one year from the time the note was given. Such, we think, is not the proper construction to be given it, and could not have been so intended by the party who added this word to the note. The proper construction to give the note as thus changed is as though it had been made to read ten per cent, per annum, and when so construed, the alteration added nothing to the extent of the makers' liability, nor did it change their liability in any way.

Had the note been made payable two or more years after date

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perhaps a different rule would apply, but upon such a question we express no opinion.

The judgment below must be reversed and a judgment rendered in this court upon the finding of the Circuit Court, for the sum of \$1,175.07 with costs of both courts.

GRAVES, J., and CAMPBELL, C. J., concurred.

COOLEY, J., concurring. When commercial paper is payable with annual interest, the expression means with interest payable at the end of each year. If the paper is to mature in less than two years, the expression is a very unsuitable one to apply, and as has been shown by my brother Marston, if construed strictly, the interest for the fraction of the second year would not be payable when the principal was payable, but at the end of the year. I am inclined to think that in a note to run less than two years the words specifying the rate of interest to be paid annually must be understood as naming only the rate to be paid for the yearly period, and not as requiring an installment to be paid when the first year was completed. If so, the supposed alteration of the note in suit did not at all affect its legal meaning, and might have been innocently added to show that the ten per centum interest was to be earned yearly, and was not all that was to be paid for the whole period the note was to run.

CAMPBELL, C. J., concurred.

GRAVES, J., concurring. I agree with my brother Marston in the result, but I wish to add a word or two. It appears from the case that the other note in suit, which was also made by defendants to plaintiff's intestate, and at about the same time as that in question, was so framed as to provide in terms that the interest should not only be ten per cent, but at that rate per annum. Hence that instrument was shaped so as to contain a literal statement that the rate was by the year and not by a different period.

The contested note as first written lacked this literal certainty and notwithstanding the unimportance of the circumstance upon the legal effect of the paper, it seems to me the fact that the parties had so recently and in a like transaction taken the precaution to put in an equivalent expression to denote that the rate of interest mentioned was by the year — not to signify the time for paying

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interest — is one which helps to show that the word “annually” was added in the second note for the same purpose, and not to prescribe yearly payments. If so, it concurs with the operation of the rule that when a paper is open to a construction implying wrong and also to one which does not, the latter should be adopted unless the surrounding facts against it are strong enough to prevent. Here such surrounding facts are not found.

JOHNSTON V. KIMBALL TOWNSHIP.

(39 Mich. 187.)

Surety — bond not signed by principal.

A surety is not bound by an official bond not signed by a principal named therein, but delivered without the surety's knowledge or consent, and the burden of proving such consent is on the plaintiff.*

ACTION on bond. The opinion states the case. The plaintiff had judgment below.

Brown & Farrand, for plaintiffs in error.

E. G. Stevenson and *O' B. J. Atkinson*, for defendant in error. A bond may be just as binding on sureties without as with the principal's signature. *Palmer v. Oakley*, 2 Doug. (Mich.) 443; *Adams v. Bean*, 12 Mass. 136; *U. S. v. Linn*, 15 Pet. 290.

CAMPBELL, C. J. Recovery was had against plaintiffs in error as bondsmen of Horatio N. Maxwell, a defaulting treasurer of the township of Kimball.

The official bond of that officer was drawn up in the usual manner, setting forth himself as principal and plaintiffs in error as sureties by name, and bound them all to the performance of his duties. He never signed the bond, and it was accepted by the supervisor without any knowledge or consent of the sureties that it was not to be signed by the principal.

The court below, although there was positive evidence of a want of consent, directed judgment against the sureties.

*To same effect, *Hall v. Parker*, 39 Mich. 287.

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Our statutes plainly contemplate that the treasurer shall himself be a party to his own official bond. Comp. L., §§ 713, 716, 717. And while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of opinion that where he purports to be obligor and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature, before they can be held responsible. The obligation of a surety cannot fairly be extended beyond the scope of his written contract, inasmuch as under our statute of frauds his agreement must be in writing; and we think that presumptively, at least, where the contract which he signs calls for the signature of other parties, the instrument is to be deemed inchoate and imperfect until they also sign it.

We are quite aware that there is a conflict in the cases on this subject as to the presumption of consent and the burden of proof.

In the recent case of *Hall v. Parker*, 37 Mich. 590 ; s. c., 26 Am. Rep. 540, we acted upon the principle which we now act upon and held a surety not liable on a bond which was not completed according to its terms. In *Wells v. Dill*, 1 Mart. (La.) (N. S.) 592, the doctrine was thus laid down : “ The contract is incomplete until all the parties contemplated to join in its execution affix their names to it ; and while in this state cannot be enforced against any one of them. The law presumes, that the party signing did so upon the condition that the other obligors named in the instrument should also sign it ; and their failure to comply with their agreement gives him a right to retract. . The authority of Pothier is express on this head. Pothier, *Traité des Obligations*, No. 11.” In our opinion this doctrine is the safest and most in accordance with principle.

Where several names are written as co-obligors and one of them is called upon to sign it, he does so upon an implied understanding that he can in case of being held responsible not only have his right to contribution, but a further right to have it capable of proof and enforcement according to the terms of the contract as it purports to be drawn up. And he has a right to insist that he will not be bound except upon his own terms, reasonable or unreasonable. It is for himself and not for others to determine these terms. And if it is claimed he has waived them, or become estopped from relying on them, the burden of proof ought not to be laid upon him to

show that there has been no variance, but upon the plaintiff to show what is substantially a new contract.

Although we do not base our decision upon the ground that in this case there are substantial and legal reasons for requiring the treasurer to sign his own bond, yet such reasons are not without force. It was claimed on the argument that the sureties would have a right of contribution against the treasurer at any rate whether he did or did not sign the bond with them. This may be true, but if he had signed the bond he would not only be estopped by the judgment from contesting his liability, but the sureties could require recourse to his property to satisfy the execution before seizure of theirs. These are not barren advantages.

The case of *McCormick v. Bay City*, 23 Mich. 457, had no bearing on this case. There the sureties signed a bond which had not the names of other obligors inserted, and which when completed and filed had nothing suspicious on its face. Here the bond shows on its face that the principal has not signed a paper in which he is positively set forth as the person whose signature is to be that of the primary debtor, whose fellow-obligors only promise that he shall do his duty. The difference is obvious.

The present case is within the principle of those cases which throw the burden of proof on the sureties to establish their non-consent, for here that non-consent was made out. But we are not disposed to follow that rule, which seems to us in violation of the fundamental principles of suretyship, and essentially unjust.

The judgment must be reversed with costs of both courts, and judgment on the record for plaintiffs in error, as the declaration makes out no cause of action.

Judgment reversed.

The other justices concurred.

FAULKS V. PEOPLE.

(30 Mich. 200.)

Criminal law — selling liquor to minor — intent.

On a prosecution for selling intoxicating liquor to a minor, it is a good defense to show that the seller reasonably believed him of age.*

*To same effect, *Furrell v. State*, 32 Ohio St. 456; 30 Am. Rep. 614, and note, 617.

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CONVICTION of selling intoxicating liquor to a minor. The opinion states the case.

Otto Kirchner, attorney-general, for People. Selling liquor to a minor is unlawful regardless of intent. *McCutcheon v. State*, 69 Ill. 601.

Isaac M. Crane and *M. V. Montgomery*, for respondent.

CAMPBELL, C. J. Respondent was convicted before a justice of selling intoxicating liquor to a minor, and appealed to the Circuit Court of Eaton county where he was again convicted.

Two preliminary questions of jurisdiction are raised.

[Omitting these.]

The court held that it was no defense to a charge of selling intoxicating liquor to a minor that the seller had reason to believe and did believe him to be of age. This we think was clearly wrong. It cannot be assumed that the legislature would attempt such a wrong as to punish as criminal an act which involved no criminal intent. There can be no crime where there is no criminal mind. This principle is as old as the criminal law, and underlies the whole of it. *Pond v. People*, 8 Mich. 150.

The judgment must be reversed and a new trial granted.

Judgment reversed.

The other justices concurred.

BROWN V. BARNES.

(39 Mich. 311.)

Slander — evidence of pecuniary standing of defendant.

In an action of slander, the pecuniary standing of the defendant may be shown to indicate the influence of his speech, but not in itself to enhance damages. (*See notes, p. 377.*)

ACTION of slander. The opinion states the case. The plaintiff had judgment below.

J. W. & O. C. Ransom, for plaintiff in error. Damages in slander cannot be affected by evidence of defendant's wealth (*Ware v.*

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Curtledge, 24 Ala. 622 ; *Morris v. Barker*, 4 Harr. 520) ; or poverty. Townshend on Slander, § 417 ; *Myers v. Malcolm*, 6 Hill, 292 ; *Palmer v. Haskins*, 28 Barb. 90.

Littlejohn & Hart, for defendant in error.

CAMPBELL, C. J. Mrs. Barnes sued Brown for slander, upon allegations that he had charged her, in conversations referred to, with larceny and perjury.

[Omitting minor points.]

Brown was allowed to be asked, against the objection of his counsel, concerning his pecuniary circumstances at the time of the slander. The court cautioned the jury very carefully against giving such testimony any consideration except as bearing on the injury likely to flow from slanders uttered by a man of his standing.

We are quite sensible of the danger of opening the door to such inquiries, because the jury may be influenced by the testimony at times more than they should be in calculating damages. But if testimony is admissible at all, that is a risk which can only be guarded against by cautions from the court, which here were faithfully given.

There has been some conflict in the authorities about such evidence, but there are respectable decisions in favor of it, some of which were cited on the argument. Such questions must be determined somewhat by the ordinary experience of men, and certainly the mischief of slander depends very much on the influence of its author and his standing among his neighbors. This must itself depend on a great many things combined, and it cannot be denied that pecuniary standing is one of the elements which we are very apt to consider in determining the position and weight of others. It is far from being the only or controlling element, but it may be an important one, and it is frequently if not generally of some force. A similar inquiry was presented in *Threadgool v. Litogot*, 22 Mich. 271, but it was not necessary to consider it fully. We think there is reason for admitting such inquiry, with cautions against allowing it weight beyond what it deserves, and especially against allowing it to swell the damages on its own account. In the present case it does not appear to have done so.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

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NOTE BY THE REPORTER.—The majority of the cases hold that evidence of the defendant's wealth is admissible in actions of slander, to enhance damages. To this effect is *Haynor v. Cowden*, 27 Ohio St. 292 ; a. c., 22 Am. Rep. 303. Even if admitted, as in the principal case, to show the defendant's probable influence, it must indirectly operate on the question of damages, and the distinction drawn is futile. The following are the chief decisions:

In *Bennett v. Hyde*, 6 Conn. 24, it was held that in an action of slander, the plaintiff may prove the amount of the defendant's property, to aggravate damages. The court said: "It has been frequently adjudged, in this State, and may be considered as established law, that the plaintiff in an action of slander may prove the amount of the defendant's property, to aggravate damages; and on the other hand, that the defendant may recur to the same evidence for the purpose of mitigating them." "It is not to be inferred that the damages are of course to be proportioned to the defendant's property; but merely that property forms an item which, in the estimate, is deserving of regard. Great wealth is generally attendant with correspondent influence; and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same declarations made by a man of small estate, and as a consequence not uncommon, of small influence. Property therefore may be, and often is, attended with the power of perpetrating great damage, and in the estimate of a jury becomes an interesting inquiry. I am not asserting what ought to be but what is; and that the degree of injury necessarily is dependent in some measure on the considerations before mentioned."

In *McBride v. McLoughlin*, 5 Watts, 375, an action of trespass for malicious abuse of process and sale of the plaintiff's property, it was held that vindictory damages might be recovered, and the court remarked: "On what other principle are the circumstances of the defendant put before the jury, for purposes of aggravation or mitigation, in perhaps all cases of personal tort? The ability of the plaintiff legitimately enters into the estimate of compensatory damages, because a dollar is worth less to a rich man than to a poor one; but the extent of an injury has no imaginable relation to the means of him who is to repair it. In actions whose end is clearly compensation and no more — trover or debt, for example — the law inquires not into the ability of him who has converted my chattels or withheld my money, but gives me the same damages or interest, whether he be rich or whether he be poor, or whether the wrong were more or less excusable in a moral view; and the converse shows that where the defendant's circumstances are brought into the account, something else than individual reparation is contemplated."

In *Buckley v. Knapp*, 48 Mo. 158, the court said: "The remaining question to be considered is the action of the court in permitting evidence to be introduced to show the defendant's wealth as an element in estimating the damages. Upon this question it is conceded that the authorities have not been quite uniform. But the weight of the authorities, and reason, we think, is decidedly in favor of the admissibility of the evidence. Mr. Greenleaf, who strongly opposes the doctrine enunciated by Sedgwick in favor of exemplary or vindictive damages, admits the point raised in this case, and in speaking of the action for assault and battery, he says that the jury are not confined to the mere corporal injury which the plaintiff has sustained, but they are at liberty to consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon to award such exemplary damages as the circumstances may in their judgment require. 2 Greenl. Ev., § 89. In *Hosley v. Brooks*, 20 Ill. 115, the court declared that in slander, the jury, in estimating the damages, may consider the defendant's pecuniary circumstances and his position and influence in society. The defendant's wealth is an element in his social rank and influence, and therefore tends to show the extent of the injury from his slanderous speech. And such seems to be now the case in actions for malicious torts generally. *Humphreys v. Parker*, 52 Me. 102; *Lewis v. Chapman*, 19 Barb. 252; *Richards v. Booth*, 4 Wis. 67; *Rowe v. Moses*, 9 Rich. 423; *Bell v. Morrison*, 27 Miss. 68. *McAuley v. Birkhead*, 13 Ired. 28. In Buller's N. P. 18, it is laid down that evidence of the circumstances of the defendant is admissible in order to increase the damages. This is cited in 2 Phill. Ev. (C. & H. ed.) 258. In *Bump v. Betts*, 23 Wend. 85, the court, in deciding on the question of excessive damages, points to the fact that the defendant had the command of great wealth, and that the plaintiff was a poor man, as two of the circumstances justifying the heavy verdict. In the case of

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McConnell v. Hampton, 12 Johns. 235, proof was received that Gen. Hampton, the defendant, was in receipt of an annual income of \$80,000. Such evidence was received to justify a heavy verdict and to show the ability of the defendant to pay. In *McNamara v. King*, 2 Gilm. 432, where an action of trespass was brought for assault and battery, the court permitted the plaintiff to prove that he was a poor man with a large family, and that the defendant was a wealthy man, with no children and but a small family; and it was distinctly announced that the condition in life and circumstances of the parties were peculiarly the proper subjects for the jury in estimating damages; that they might take into consideration the pecuniary resources of the defendant, and might give exemplary damages, not only to compensate the plaintiff, but to punish the defendant, according to the circumstances of the case. In all cases where vindictive damages are allowed it is upon the theory that the defendant's conduct has been such that he deserves to be punished, and they are given with a view of measuring out punishment to him as well as awarding compensation to the plaintiff. When we arrive at this conclusion it seems to me that it logically follows that the inquiry as to the pecuniary resources of the defendant becomes pertinent and material, for what would be a severe punishment to a very poor man would be of no consequence to a rich one."

In *Hosley v. Brooks*, 20 Ill. 115, an instruction that the jury "may take into consideration the pecuniary circumstances of defendant and his position and influence in society, in estimating the amount of damages," was held correct without any reported consideration.

In *Humphreys v. Parker*, 53 Me. 502, such evidence was held proper in an action of slander and malicious prosecution, on the question of damages. The court said: "In actions of slander we regard the law as well settled, that the defendant's wealth, as an element which goes to make up his rank and influence in society, and therefore his power to injure the plaintiff by his speech, is a fact not to be overlooked by the jury in estimating the damages."

In *Kanesy v. Paisley*, 13 Iowa, 89, such evidence was held admissible in aggravation or mitigation of damages. The court said: This "has been a rule of practice so frequently established and followed by the courts, that we have no disposition to change it." Citing *Bennett v. Hyde* and *Hosley v. Brooks*.

Bell v. Morrison, 27 Wis. 68, sometimes cited in this connection, was a case of assault and battery, and this class of evidence was held proper, FISHER, J., dissenting. After remarking on the rule of exemplary damages in cases of injury to person or character, the court said: "If this rule * * * be just and salutary, it can only be properly and effectively applied by taking into consideration * * * the situation of the parties as to wealth, character and influence," etc.

In *Shute v. Barrett*, 7 Pick. 82, sometimes cited in this connection, the question does not seem to have arisen, but PARKER, C. J., on a question of excessive damages, remarked: "The defendant too is a man of substance and influence. His public declaration of a fact would have weight; so that more humble retailers of slander would be willing to rest upon him as authority." But in *Larned v. Buffinton*, 8 Mass. 546, it was held that the plaintiff might prove his own rank and condition to aggravate, and the defendant might avail himself of such evidence to mitigate, the damages. This however seems not to have extended to proof of poverty or pecuniary standing.

The class of evidence in question was held admissible, in *Adcock v. Marsh*, 8 Ired. 360. The court said: "The object of the law in giving damages in actions of tort is to compensate the plaintiff for the injury he has sustained; and in giving vindictive damages to punish the defendant for his iniquitous conduct. In neither case ought justice to be lost sight of, and in neither case does the law contemplate or intend the ruin of the defendant. Without a knowledge of his circumstances, the jury might give damages against him utterly ruinous, and such as against another of greater property would not be felt." This theory of tenderness to the poor defendant seems a novel reason for the admission of evidence by the plaintiff to aggravate damages.

In *Lewis v. Chapman*, 19 Barb. 252, the court said: "The plaintiffs were not called upon to state the particular object of introducing the evidence, and if it were pertinent or competent for any purpose the ruling should be sustained. The question then arises, is evidence of the pecuniary circumstances and standing of the defendant in the community admissible

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in actions of this character, for any purpose? In a case recently decided in the Court of Appeals (*Dain v. Wyckoff*, 3 Seld. 191), GARDINER, J., seems to be clearly of opinion that such evidence is incompetent. He remarks that it has been the custom at the Circuit to admit evidence of this character, but that he could discover no authority for the practice in the elementary books. On this point, however, the other judges expressed no opinion, and the case was decided upon another ground." (That was an action of seduction.) The court then distinguish *Myers v. Malcolm*, 6 Hill, 202, which was an action of damages for injury by explosion of gunpowder, and continue: "Greenleaf * * * admits that wherever the defendant's rank, wealth, or influence in society would naturally tend to aggravate the injury complained of, and increase its extent, evidence of such facts is pertinent to the issue. And he puts the case of actions of slander, seduction, and the like, as those in which the character of the parties is necessarily involved in the nature of the action. But this evidence, he insists, is proper by way of showing the extent of the injury, and not for the purpose of establishing the defendant's ability to pay." The Court cite *Bennett v. Hyde*, 6 Conn. 24, and *Shute v. Barrett*, 7 Pick. 86, to the same doctrine, and conclude: "It seems to me therefore clear from authority that the evidence was properly admitted, as bearing upon the extent of the injury, if for no other purpose. It is apparent that a statement of this kind, coming from a banker of wealth, whose solvency was unquestioned, would operate far more extensively and injuriously than the same statement from a less responsible and less influential source." This decision was reversed on another point.

In *Palmer v. Haskins*, 28 Barb. 90, it was held that such evidence was not admissible on the subject of damages, and the court said: "If the evidence is admitted simply for the purpose of showing the influence of the defendant, and hence the extent of injury to the plaintiff, it should be confined to the time when the slander was uttered. The defendant may at that time have been poor; and at the time of the trial rich, or *e converso*." "I find no adjudication, where the question has been distinctly raised, holding that the wealth of the defendant may be proved as an item to show his character, standing and influence in society. That the general standing in society of either of the parties may be proved, I have no doubt. But I do not think that it is necessary or proper to prove to the jury the wealth or poverty of either of the parties. It is a question with which they have nothing to do in estimating the damages." "I am not satisfied that such evidence, as a separate independent item, should be admitted for any purpose."

In *Case v. Marks*, 20 Conn. 248, it was held that in an action of slander the defendant cannot prove his own poverty in mitigation of damages; and the court said of *Bennett v. Hyde*, 6 Conn. 24: "This court held that the plaintiff might prove the amount of the defendant's property, to aggravate damages, in an action of slander; and this solely on the ground of a supposed weight and influence which wealth might give to the slanderous words. We do not intend to overrule that decision, although we could better reconcile it to our views of correct principle if we could see that wealth alone, especially in this state of society, gives of course to its possessor rank and influence. If it does in some instances, this is not so commonly true, we think, as that a new and important legal principle should grow out of it. However this may be, in the present case it is the defendant who offers to prove his own pecuniary condition to shield himself from the consequences of his own wrong."

Such evidence was held inadmissible, in *Ware v. Cartledge*, 84 Ala. (N. S.) 622. The court said: "The mere ownership of \$20,000 worth of property is not legal evidence of the owner's rank and influence in society. Greenleaf and Starkie agree that the defendant's ability is not a legitimate inquiry in an action of slander, and the courts of New Jersey agree with them; and this conclusion is fortified by the general principles regulating the assessment of damages. Greenl. Ev., § 269; Stark. on Slander, 402; Coxe, 79, 80; *Seay v. Greenwood*, 21 Ala. 495; *Jones v. Donnell*, 13 id. 490. Opposed to this array of principles and authorities, one or two States have, without reason and contrary to principle, adopted a different rule. *Case v. Marks*, 20 Conn. 248, shakes the force of *Bennett v. Hyde*, 6 id. 24, and in *Morris v. Barker*, 4 Harr. 520, it was expressly held that the defendant's circumstances cannot be given in evidence in an action of slander."

Morris v. Barker, 4 Harr. 520, was a *nisi prius* case, and the report simply shows that the class of evidence in question was excluded.

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Coryell v. Colbaugh, Coxe, 77, 1 Am. Dec. 192, was a *nisi prius* case of breach of promise of marriage where the court charged that "defendant's poverty ought not to prevent exemplary damages;" "It was their duty to measure the injury he had done, and not the purse of the defendant." The question of evidence does not seem to have arisen.

In *Kniffen v. McConnell*, 30 N. Y. 289, an action of breach of promise of marriage, evidence of reputation of the defendant's pecuniary circumstances was held admissible. This is put on the ground that it would show what the station of the plaintiff in society would have been if the promise had not been broken.

 PEOPLE V. COOK.

(30 Mich. 236.)

Criminal law — homicide — justification.

Homicide is not justified by the defendant's belief that the deceased had administered drugs to the defendant's sister in the unaccomplished endeavor to effect her seduction.

CONVICTION of manslaughter. The opinion states the case.

Otto Kirchner, attorney-general, for People.

A. J. Sawyer, for respondent.

MARSTON, J. The respondent was tried upon an information charging him with having committed the crime of murder, and was convicted of manslaughter. The case comes here upon exceptions before sentence. The shooting of the deceased by respondent was not denied on the trial. The defense relied on was :

First. That the death was actually caused by morphine poisoning before the wound had so far affected vitality as to induce a belief that it was or could have been the cause of death ;

Second. Justifiable homicide, committed in order to prevent the abduction and seduction of respondent's sister by the deceased ; and

Third. Insanity.

The errors assigned all range and may appropriately be considered under these three divisions.

[Omitting the first and third.]

Second. Justifiable homicide. There is not a scintilla of evidence in the case tending to establish this defense, unless the fact

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that he had reason to believe that deceased was about to seduce and debauch his sister would be a justification. The undisputed evidence showed that the respondent took his gun, and went out into a field; that he got over into the road at the corner of the street going past the house where the deceased resided; that a person who then met respondent asked him what was going to take place, and he replied, "there will be a damned funeral here, for I am going to shoot Bill Batey;" that he then went on up the street a little ways, drew up his gun and fired. At this time Batey was distant from him from ten to twenty rods, and was walking toward his (Batey's) house, in a direction away from the respondent; that after shooting, respondent reloaded his gun, put a cap thereon, and said "he guessed Batey had something that would last him now." The parties were not near each other; they had no altercation or personal difficulty; no threats of personal injury to respondent had been made by deceased; and as between these two parties there was no pretense of excuse or justification for the shooting.

It was said that the testimony given on the trial showed the reputation of the deceased for chastity was bad, of which fact the respondent had knowledge; that deceased had been arrested for the seduction of a Miss Briggs; that he had publicly stated in respondent's presence and hearing the manner in which he had seduced her; that while under such arrest he had stated that he wanted to seduce just one more girl, Sarah Cook, but this fact had not been brought to respondent's knowledge; that the night before the shooting deceased and Sarah Cook had been out together quite late; that on the morning of the shooting, respondent's sister, Sarah Cook, left the breakfast table and went over to the house of deceased; that she shortly afterward returned, took her wearing apparel and announced that she was going off with Batey, bade the family good-bye, and said they might never see her again.

The defense claimed the further fact to be that Sarah Cook at that time was under the influence of drugs, administered to her by deceased, in order to enable him to accomplish his purpose, and that the shooting was believed by the respondent to be necessary in order to prevent such a result.

Certain alleged facts were offered and excluded by the court, for the reason, with others, that they had not been brought to the knowledge of the respondent previous to the shooting, and this is alleged as a distinct ground of error.

This proposed evidence was properly excluded. Not being known to the respondent it could have made no impression upon his mind, and could not have influenced him in any degree in the commission of the fatal act.

Evidence of previous threats not communicated or known, is admissible to confirm or explain other evidence in the case tending to justify or excuse a homicidal act, as having been committed in opposing force to force in defense of life or to avoid great bodily harm. Such evidence is admissible, because, in connection with other evidence, it tends to show in cases of doubt who was the real aggressor, and the probable character of the assault made which had to be repelled, as a person who has made threats is more likely to make an assault upon another. In other words, such evidence tends to show and explain the acts of the deceased at the time of the affray, and for this purpose the threat and not its communication is the material fact. But where it is clear that the deceased, at the time the wound was inflicted, made no attempt to enforce his threats, or from the position of the parties could have made none, so that the accused could not reasonably have supposed that his life was in danger, or that he would receive grievous bodily harm, or that immediate action on his part was necessary to prevent a felony attempted by violence, then evidence of previous threats, whether known to the accused or not, are inadmissible in evidence. 2 Bish. Cr. Pr., § 627; 2 Whart. Cr. L. 1020; *People v. Lamb*, 2 Keyes, 360; *Powell v. State*, 19 Ala. 577; *Stokes v. People*, 53 N. Y. 164; 13 Am. Rep. 492; *Dupree v. State*, 33 Ala. 380; *Newcomb v. State*, 37 Miss. 400; *Holler v. State*, 37 Ind. 57; s. c., 10 Am. Rep. 74; *People v. Scoggins*, 37 Cal. 682; *Pitman v. State*, 22 Ark. 357; *Atkins v. State*, 16 id. 584.

Would then the belief which the respondent entertained in reference to the injury to his sister justify him in the course which he adopted? It was argued that the law justifies homicide when committed in the defense of the chastity either of one's self or relations; that it is the duty of every one who sees a felony attempted by violence to prevent it if possible, and that life may be taken in so doing if necessary. Citing 4 Bl. Com. 181, and *Pond v. People*, 8 Mich. 177. The law is undoubtedly laid down in the authorities cited as claimed. But the felony in either case must be a forcible one.

Blackstone says the English law justifies a woman killing one who attempts to ravish her, and so too the husband or father may

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justify killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious but not the other. The principle, he says, which runs through all laws seems to be this: that where a crime in itself capital is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting. It is not claimed that any direct force was attempted in this case, but that the felony intended was to be accomplished by the assistance of drugs administered or to be administered, and that where the power of resistance is thus overcome, and advantage thereof taken to violate her person, the act would be rape, and for such purpose the law would conclusively presume that sufficient force was used, at the time intercourse took place, so to characterize the act. The present case however falls short of coming within the principles which would justify the taking of life. The utmost that can here be said is, that the deceased had used and was likely to use fraudulent means, by administering drugs, to excite the passions, or overcome the resistance he otherwise would have been sure to encounter, in order to accomplish his purpose. So far as he had then gone, even conceding all that is claimed, fraudulent and not forcible means had been resorted to, which would not create that necessity for immediate action on the part of the accused, by the taking of life, to prevent an attempted forcible felony. Ample time and opportunity existed to enable the accused to resort to other available and adequate means to prevent the anticipated injury. The evil threatened could have been prevented by other means within the reach and power of the accused. There was no such immediate danger, nor would the facts warrant the apprehension of such immediate danger, as would justify a resort to the means adopted.

It must be certified to the Circuit Court that the exceptions are not well taken, and that the court proceed to judgment.

The other justices concurred.

LONG V. BATTLE CREEK.

(89 Mich. 323.)

Contract — consideration — municipal corporation.

An oral proposition by a citizen to a city council, that if the city would build one-half of a bridge across a certain river, he would build the other half, or if the city would build the whole he would pay for half, is binding on him if the city builds the bridge.

A PPEAL from probate commissioners. The opinion states the case.

John C. FitzGerald, for plaintiffs in error. The contracts of a common council are invalid unless for municipal and not private purposes (*Thomas v. Port Huron*, 27 Mich. 323; *People v. Salem*, 20 id. 470; *Sharpless v. Mayor*, 21 Penn. St. 168; *Brodhead v. Milwaukee*, 19 Wis. 624; *Colton v. Hanchett*, 13 Ill. 615; *Clark v. Des Moines*, 19 Iowa, 199; *Hodges v. Buffalo*, 2 Den. 112; *Donovan v. Mayor*, 33 N. Y. 291; *Livingston County v. Weider*, 64 Ill. 427; *Randolph County v. Jones*, 1 id. 237); a promise of a reward for doing one's duty is illegal and void (Addison on Contracts, § 253; *Mills v. Mills*, 40 N. Y. 545; *Fuller v. Dame*, 18 Pick. 481; *Marshall v. B. & O. R. R.*, 16 How. 314; *Clippinger v. Hepbaugh*, 5 W. & S. 315; *Dudley v. Cilley*, 5 N. H. 558); a municipal corporation cannot expend public money unless for public necessity; but not for private advantage. *Hanson v. Vernon*, 27 Iowa, 47; *State v. Wapello County*, 13 id. 405; *People v. McCreery*, 34 Cal. 432; *Hilbish v. Catherman*, 64 Penn. St. 154; *Warren v. Henly*, 31 Iowa, 31; *S. & V. R. R. v. Stockton*, 41 Cal. 149; *Bay City v. State Treasurer*, 23 Mich. 499.

Arthur Brown, for defendants in error.

MARSTON, J. This case came up in the Circuit Court upon an appeal from the allowance of the claim by the commissioners appointed to adjust claims against the estate of Thomas G. Duncan, deceased. A judgment was recovered in the Circuit Court and the case comes here upon writ of error.

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The principal facts out of which this claim grew are in brief, that Duncan was the owner of a tract of land in the city of Battle Creek which he desired to improve; that in April, 1870, he appeared before the common council of said city, and made a verbal proposition in reference to the building of a bridge across the Kalamazoo river, at the foot of Kendall street, and the extension of Kendall street across his land; that action was thereafter taken by the common council in reference thereto, his proposition was accepted and the bridge constructed, and it was claimed on the part of the city that it was entitled to recover out of his estate, in accordance with the proposition made by him and accepted by the city, one-half the contract price of building the bridge, less the amount paid on Mr. Duncan's behalf during his life-time.

It will not be necessary to discuss the several errors assigned separately and each at length; they raise certain legal propositions which we will proceed to consider.

First. That there was only one way by which the common council could act in the premises, viz.: by resolution, and that whatever action they did take is conclusively presumed to be evidenced by their record, and that parol evidence is inadmissible to alter, add to, or supplement such record; that the court erred therefore in permitting oral testimony to be given of the proposition made by Mr. Duncan to the council, and in permitting Joseph G. Hoyt to give evidence of certain conversations which he afterward had with Mr. Duncan in reference to the building of this bridge, and which, it is claimed, varied or changed the original proposition and contract, if any such contract were ever made.

The legal proposition asserted by counsel is correct as a general one; the difficulty arises in its application to the facts in this case.

The proposition submitted by Mr. Duncan to the common council was not in writing. It is true that the records of the council contain what purports to be the substance of that proposition. This was necessary in order to point to or make clear the subject-matter in case the council should take any action in reference thereto. The proposition as made might be spread upon the record by the clerk, or it might be incorporated in a preamble or resolution adopted by the council, and thus become a part of their record. In either event it could not be conclusively presumed to contain the proposition made in all its details, and would not preclude Mr. Duncan or his representatives from showing what the proposition, as actually

made, contained, even although by so doing the record might be contradicted, added to, or varied. While the city would be concluded by the record evidence of the action taken by the common council, neither the city nor third parties could be by the recitals in the record of oral propositions made by third persons. Either party would be at liberty to prove by oral testimony the proposition actually submitted and acted upon. Of course, the result of such a showing in some cases might establish the fact that nothing had in truth been agreed upon ; that the proposition as submitted and the one acted upon and accepted were so dissimilar that the minds of the parties could not be said to have met upon any thing. Of course an oral proposition might be submitted, and as it appeared upon the record, be changed or varied, and accepted or acted upon in its changed condition, and yet bind the parties by ratification by the acts and declaration of the person making the proposition, after having been in any way made aware of the changes.

It was competent therefore to show, independently of the records of the council, the proposition made by Mr. Duncan in reference to the building of this bridge, and also the conversation which members of the council afterward had with him in reference thereto, whether instructed to confer with him upon the subject or otherwise. *Detroit, Lansing & Lake Michigan R. R. Co. v. Starnes*, 38 Mich. 698; *Taymouth v. Koehler*, 35 id. 22.

Second. It is claimed that no contract whatever was shown to have been made ; that the proposition made by Duncan was so indefinite and uncertain that it could not have, or be given the force of a contract ; that the proposition made was for a "good bridge," but did not state its size or class, whether foot, toll or suspension ; whether it should be built of iron, wood or stone, nor the particular place where, or when it should be built, or the expense or cost thereof, and that the report of the committee, and the action of the council thereon must necessarily be equally indefinite and uncertain, as the council could only accept or reject the proposition as made.

This last statement, as we have already said, is not strictly correct. The council could accept the proposition with such changes and modifications as was deemed best, and should the party afterward be informed of the changes or conditions, and assent thereto, he would be bound thereby the same as though such changes or conditions had been contained in his original proposition. If an offer

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or proposition is made by a person to a corporation in relation to a matter within the scope of its authority, and is accepted in a modified form, we know of no legal principle which would prevent both parties from carrying out the agreement in its new or accepted form, if they thought proper so to do.

In regard to the indefinite and uncertain nature of the proposition and acceptance, were this an action brought to enforce specific performance of the agreement or to recover damages from non-performance of the contract in not building the same, the objections urged would have some force. Such is not this case. Here the bridge has been built, no question is made as to the time, place or manner of its construction, or that it in any respect falls short of the kind of bridge contemplated by the parties. If Mr. Duncan simply stipulated for a "good bridge," leaving the kind of bridge and all the details to the council, and found no fault with the action taken by the council so far as known to him, it is now too late for his representatives to come in after they have obtained all he stipulated for, and because of the indefinite nature of his proposition decline to pay the stipulated price.

It was, however, urged that Mr. Duncan's proposition was, that "if the city would build one-half of a good bridge across the Kalamazoo river, he would build the other half;" that the only evidence tending to change this proposition was that of Hoyt, who testified that as one of a committee appointed by the council "to confer with Mr. Duncan in reference to procuring timber for the bridge," he had a conversation with him relative thereto; that Duncan said to him that he, Duncan, wanted nothing to do with building the bridge himself,—he would rather the city would go on and build it and he would pay one-half of it. After this the council authorized one of its committees to advertise for bids for building the bridge, and let the contract under which it was constructed.

We think that this evidence in no way tended to change or modify the original agreement. The oral evidence as to the proposition submitted by Mr. Duncan was, that if the city would go on and build a bridge across the river, he (Duncan) "would be to the expense of half the bridge—building half the bridge." If this was the proposition made, then there was no change made, but we are of opinion that even if the language used by Mr. Duncan was, that "if the city would build one-half of a good bridge across

the Kalamazoo river, he would build the other half," the legal effect and construction thereof would be the same. It could not have been the intention that each should literally build one-half, any more than that if the members of the common council should themselves personally do the manual labor upon one-half the bridge he (Duncan) would with his own hands construct the other half. Bridges are not usually constructed by piece-meal in that way. In the construction of bridges across rivers between different corporations on the lines of public highways, each builds one-half the bridge by paying one-half the expense thereof, but the bridge is constructed as a whole. So in this case the proposition to build one-half was but another way of saying that he would pay one-half the expense of its construction. This follows from the nature of the subject-matter about which the parties were negotiating.

Third. It is also insisted that the council could not extend Kendall street without first declaring it to be a necessary public improvement; that until they had extended it across the river they could not contract to build a bridge there, as they only possessed power to build bridges upon public streets; that the declaration does not allege nor the proofs show that public necessity or even convenience required the building of this bridge, while it does appear that the object was to improve and render more valuable the lands of Duncan and increase their value.

There is no force in these objections. If the council had been seeking, under the power of eminent domain, to open and extend this street, there might be force in the objection. Where, however, a person, as in this case, offers upon certain conditions to throw open a street across his land for the use of the public, an acceptance of such proposition by the proper authorities is a sufficient declaration of its necessity as a public improvement, even if any such were needed; and the fact that the improvement would benefit the lands of private individuals could be no objection. It is frequently the case in all cities that parties owning lands which would be rendered more valuable by having a street opened and graded through the same, offer to open or permit to be opened a street on condition that the city will open and grade the street and build the necessary fences, and the power of the common council to accept such a proposition and proceed with the work we have never heard questioned. There can be no doubt of the power to

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accept upon such or similar terms, unless prohibited by some provision in the charter, which is not claimed in this case.

But it is said that such a proposition as the one made by Duncan, even if accepted by the city, would be void as being against public policy; that this council was the municipal legislature of the city, and the proposition appears upon its face to have been made in reference to legislative action; that if it was not the duty of the city to build the bridge they had no warrant for doing it. If it was their duty to build, Duncan's promise to pay a part of the expense was a promise to pay them a premium for doing their duty, and therefore void; and that the corporation had no right to expend money unless the public exigency required it, and not for private advantage. Such in brief was the argument advanced.

We see nothing in the proposition as made, or accepted by the common council, which could be considered as contrary to public policy, or that the proposition was made for the purpose of influencing the legislative action of the council in such a manner as to render the agreement void.

This offer had no reference to a purely private matter. It had reference to the extension of one of the public streets of the city, and the erection of a public bridge on the line thereof free to and for the benefit of all the inhabitants of the city. The entire expense of the improvement contemplated may have been so great that the council may well have hesitated at that time to assume the entire burden. The fact that private individuals would be benefited by the improvement, and that they therefore should offer to bear a portion of the expense, would make the improvement none the less a public one, or one that the common council should not then make, because of the offer.

Had the council proposed to build an inferior or temporary bridge or one not considered fully adequate to meet the wants of the public, might not a portion of the citizens offer to contribute a portion of the expense of building a better and more ornamental one? Or might not the citizens on the line of a contemplated street offer to pave it if the council would open and grade it? Clearly we think this might be done, and that an offer so made, if accepted and acted upon by the council within a reasonable time, would be binding and obligatory upon the parties. The mere fact that it might be the duty of the city unaided to make the desired improvement would

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not render an agreement to aid void. *Stevens v. Corbitt*, 33 Mich. 461.

But it is said such a proposition influences legislative action and is therefore void. There are many ways in which a legislative body may be fairly and legitimately influenced. It is not the fact merely of influencing a legislative body, but the manner or method resorted to that is condemned. The reason why agreements to aid and influence legislation are usually held void as being contrary to public policy is, that they tend to subject the members to secret, improper and corrupting influences. No such reasons, however, exist in this case. Here the proposition was openly and fairly made in an honorable manner to the body itself; no promise, reward or private benefit was secretly or otherwise offered or presented to any of the individual members of that body. The only interest or inducement held out to them was a public one. In all this we can discover nothing secret — nothing improper or corrupting in its tendency.

It is unnecessary to examine the several cases cited by counsel for plaintiff in error. We should have no hesitation in following them, in a case where we considered them applicable. The authorities cited by counsel for defendant are more directly in point and sustain the agreement in this case.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

GREGORY V. WENDELL.

(30 Mich. 337.)

Contract — future delivery of stocks — margins.

An agreement for future delivery of stocks, where there is no intention of delivering, but only of settling the difference between the agreed and the market price, is invalid, and "margins" cannot be recovered back, but the question of good faith is for the jury.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

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Atkinson & Atkinson, for plaintiffs in error.

Otto Kirchner and *Ashley Pond*, for defendants in error, cited as to the legality of "option deals," *Clark v. Foss*, 10 Chic. Leg. News, 211; *Wolcott v. Beath*, 78 Ill. 433.

MARSTON, J. Plaintiffs reside in Owosso, and in 1877 were engaged in the purchase of grain and other farm products. Defendants were commission merchants in the city of Detroit.

On the 26th of April, 1877, one of the plaintiffs had a conversation with one of the defendants in the city of Detroit about speculating in corn and wheat. It resulted in plaintiffs directing defendants to purchase for them 20,000 bushels of corn, deliverable at Chicago in June following. It was claimed that defendants thereupon telegraphed to certain commission merchants in Chicago directing the purchase, and received a few minutes thereafter a telegram announcing the purchase of the quantity mentioned and at prices therein named. It was at this time agreed that the plaintiffs should send defendants \$1,000 as a margin upon this purchase, which was done within a few days thereafter. The receipt thereof was acknowledged by defendants and credited to plaintiffs' account.

Other correspondence was had between these parties in reference to this purchase and the condition of the grain markets.

On May 17th plaintiffs wrote defendants suggesting a change from June to July corn, and on the 18th defendants wrote plaintiffs that they had sold the June corn, and purchased July corn, and inclosed a statement of account showing a loss to plaintiffs. The receipt of this letter by plaintiffs was on the next day, and a hope expressed that the loss sustained on the June would be got back on the July corn. The market continued to decline. Further margins were called for but not made. Two car loads of wheat were shipped by plaintiffs to defendants, and by them sold on commission and the proceeds credited to plaintiffs on account.

Action was brought to recover the amount received for this wheat and to recover back the \$1,000 margin. There was no dispute as to the wheat or its value, and judgment was recovered for the amount thereof. The court charged the jury that no part of the \$1,000 could be recovered. In this it is claimed the court erred, and also in not submitting the question to the jury whether any corn was ever actually purchased.

Gregory, one of the plaintiffs, testified that he never saw any of the corn and that none had ever been delivered to him.

He also testified that in July certain parties called at his office; that they had an envelope, the contents of which he declined to examine, and there was evidence tending to show that they were there and offered to make him a tender of warehouse receipts for July corn. There was evidence tending to show that before the commencement of this action defendants were called upon, in the plaintiffs' interest, and requested to produce and show the telegrams in reference to the purchase of the June corn, but that although search was made, they were unable to find them, although such were produced on the trial. A Mr. Thomas, a broker on change for Cooley & McHenry of Chicago, testified that he purchased twenty thousand bushels of corn on April 26th; that he and the party from whom he purchased made the usual memorandum of the transaction, which was afterward, in accordance with the custom, reduced to formal entries on their respective books. The original memorandum and entries were not produced, and the witness was unable to give the name of the person from whom he purchased the corn, or where it was at the time, or to whom he afterward sold it. Other evidence was given which it was claimed tended to show that no actual sale of corn had been made.

It seems to me that the real questions thus raised in the case were — was there an actual *bona fide* sale of corn intended by the parties or any of them, to be delivered and received? Or did the parties intend that no corn should be purchased, delivered, received, but that a settlement should be made upon a basis of the market price of corn at the time mentioned for delivery?

Some nice distinctions have heretofore been drawn as to the right of a person to sell personal property not at the time owned by him, but which he intended to go into the market and buy — or as was said, that which he hath neither actually nor potentially. Courts must however, from necessity, recognize the methods of conducting and carrying on business at the present day, and applying well-settled principles of the common law, enforce what might be called a new class or kind of agreements, heretofore unknown, unless they violate some rule of public policy. The mercantile business of the present day could no longer be successfully carried on, if merchants and dealers were unable to purchase or sell that which as to them had no actual or potential existence. A dealer has a clear right to

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sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy. And it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time; and that there need not be an actual manual possession given, but a symbolical one, as by the delivery of warehouse receipts according to custom, is also beyond dispute.

In these cases there is something actual and tangible sold, although not then owned or possessed by the vendor, or rather something actual and tangible agreed to be sold, as the agreement is more in the nature of a contract for a future sale. There is also an intention, and such is the agreement, that when the time agreed upon for delivery arrives, the property shall be actually delivered. This, as already said, may, as in the case of grain, be by a delivery of warehouse receipts, for the quantity and quality agreed upon, rather than for any particular lot. The vendee under such an agreement may, before the time for delivery to him has arrived, agree to sell, or transfer his right to the goods, or under the contract to some one else, who, should he retain the same, would be entitled to receive possession thereof at the time agreed upon by the parties through whom he claims title.

But where the parties at the time of entering into an agreement for the purchase and sale, apparently, of goods for future delivery, agree that no title to any property shall pass and that nothing shall be delivered — no delivery made; or where, from the nature of the transaction, and the manner and method of carrying on the business, it is apparent that such was the intention of the parties, although not expressed, but the agreement or understanding was that at the time fixed for delivery they should settle upon a basis of the then market price of the commodity, by the losing party paying to the other the difference, such an agreement would be one that the law would not recognize and enforce. It would not constitute a sale or an agreement to sell property of any kind, but one to speculate upon the prices that certain property would be likely to bring at some future day.

The distinction was clearly pointed out in *Rumsey v. Berry*, 65 Me. 574. The court said: "The mischief and illegality arises when the apparent contract is not the real one, when it is a mere cover for ulterior designs and such as are not authorized by law. A

contract for the sale and purchase of wheat to be delivered in good faith at a future time is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure."

This question was fully discussed by AGNEW, J., who delivered the opinion of the court in *Kirkpatrick v. Bonsall*, 72 Penn. St. 155, where the court held a certain contract was not on its face a gambling contract, but that its character might be weighed in connection with other evidence, on the question that the transaction was a gambling scheme. The court said a bargain for an option may be legitimate and for a proper business object. "But it is evident such agreements can be readily prosecuted to the worst kind of gambling ventures, and therefore its character may be weighed by a jury in connection with other facts in considering whether the bargain was a mere scheme to gamble upon the chance of prices. The form of the venture, when aided by evidence, may clearly indicate a purpose to wager upon a rise or fall in the price of oil at a future day, and not to deal in the article as men usually do in that business. We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. * * Their speculations display talent and forecast, but they act upon their conclusions and buy and sell in a *bona fide* way. Such speculations cannot be denounced. But when ventures are made upon the turn of prices alone, with no *bona fide* intent to deal in the article, but merely to risk the difference between the rise and fall of the price at a given time, the case is changed. The purpose then is not to deal in the article, but to stake upon the rise or fall of its price. No money or capital is invested in the purchase, but so much only is required as will cover the difference — a margin, as it is figuratively termed. Then the bargain represents not a transfer of property, but a mere stake or wager upon its future price."

See farther *Grizewood v. Blane*, 11 C. B. 526 ; 73 E. C. L. 526,

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where it was held that a contract to purchase shares of stock without the intention to deliver or receive them was a gaming contract.

In *Yerkes v. Salomon*, 18 N. Y. Sup. Ct. (11 Hun) 473, it was said that the authorities were abundant upon the proposition that if neither party intended to deliver or accept shares, but merely to pay differences according to the rise or fall of the market, the contract would be a gaming one. And in that case it was held to be error to exclude a question asking what the intention at the time the contracts were made was, whether to tender or call stock, or merely to settle upon differences.

It is clear from these authorities, that the form of the contract on its face is not conclusive, but that its character should be considered by the jury in the light of all the surrounding facts and circumstances, in order for them to determine whether a mere scheme to gamble upon prices was the intention, or an actual *bona fide* sale of grain to be delivered at the time mentioned.

There were some suspicious facts and circumstances in this case. The weight thereof, or the proper conclusion to be arrived at from a view of the whole case, it is not for this court to determine. The whole case under proper instructions should have been submitted to the jury and the court erred in withdrawing the case from them. There must therefore be a new trial ordered, upon which the case may appear in one of three different aspects.

First. If the parties acted in good faith, and the agreement made contemplated an actual purchase and delivery of grain, and such a purchase was in fact made, then the amount paid by plaintiffs in error to cover any loss which defendant might suffer or become responsible for on account of a decline in the price or value of the grain purchased, cannot, to the extent of such loss, be recovered back.

Second. If under the agreement made, neither party contemplated or intended that any grain should in fact be purchased, or delivered but that at the time mentioned for delivery, the difference between the contract and the market price should be paid to the person entitled to receive the same, such agreement being void as against public policy, and both parties being equally in the wrong, the law would afford no assistance to either, and the amount paid over as a margin could not be recovered back.

Third. If plaintiffs in error, acting in entire good faith, authorized defendants to purchase grain for them, to be delivered at a

future date, contemplating and intending that an actual purchase of grain, and a delivery thereof to them, would be made, but the defendants, without being induced by plaintiffs' action into any misunderstanding, did not in fact make, or cause to be made, an actual *bona fide* purchase of grain; but acted upon the theory that the difference in price only should be accounted for and paid, then and under such circumstances, plaintiffs, upon discovery of such facts, would have a right to repudiate what had been done, and recover back the amount by them advanced or paid over to the defendants.

Judgment reversed with costs and a new trial ordered.

Judgment reversed.

The other justices concurred.

WOODS V. AYRES.

(20 Mich. 345.)

Contract — when not implied.

Assumpsit cannot be based on a spontaneous and unasked service, rendered through kindness or to be more probably accounted for than by the expectation of payment, nor on a statutory obligation.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Winsor & Snover and Levi L. Wixson, for plaintiffs in error.

Atkinson & Atkinson, for defendants in error.

GRAVES, J. In the fall of 1871 a claim in favor of the firm of Ayres, Learned & Wiswall arose against plaintiffs in error, for four dollars per thousand feet upon a quantity of pine saw logs delivered by the firm to plaintiffs in error, under an agreement for their delivery, subject to that drawback, to replace others the firm had cut on lands of the plaintiffs in error. The members of the firm in whose favor the claim arose were Ebenezer Wiswall, Charles G. Learned and defendant in error Frederick S. Ayres. November 6, 1871, this firm was succeeded by that of "Ayres, Learned & Co.," composed of Frederick S. Ayres, Jonas R. Learned and James S. Ayres,

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and this again on the 24th of October, 1874, by the firm of "Ayres & Co.," composed of defendants in error. In 1877 these parties assuming to own the claim in question brought this action upon it and recovered. The other parties brought error.

[Omitting a minor point.]

Second. Plaintiffs in error offered to show by way of set-off a demand in their favor for moving certain logs of "Ayres, Learned & Wiswall" in the Pinnepog river in the season of 1871 pursuant to the act of 1861 as amended in 1863 to regulate the "floating of logs and timbers in the streams of this State" (Sess. L. 1863, p. 374); and a further demand in their favor for moving logs of "Ayres, Learned & Co.," in the same river in the season of 1872 and pursuant to the same law. Upon objection by defendants in error the court ruled against the offer.

Assuming that all the conditions were present to generate a liability under this statute, were the demands enforceable under the set-off law? If they were not, the ruling was correct. In order to decide upon this it is necessary to consider of what nature the demand is on which this statute impresses the right of enforcement, and whether the statute of set-off fairly comprehends it.

The right of set-off at law is given and limited by statute. The common law never recognized it. Bac. Abr., tit. "Set-off." The provisions concerning set-off must therefore be consulted to see in what cases and in what circumstances the right is admitted. Unless a case is positively embraced by the specifications enacted by the legislature, the remedy is absolutely denied and the claim will remain to be separately enforced as though there were no such statute.

Now the first pre-requisite under the law allowing set-off is that the demand has arisen "upon judgment, or upon contract, express or implied" (Comp. L., § 5796, subd. 1), and unless it has originated in one of these ways it is incapable of being set off. The demands in question did not arise on judgment or upon express contract. So much may be taken for granted. If then they were capable of being set off, it must be because they arose on implied contract. Did they originate in that way? The question is not whether they constituted assumpsits in some metaphorical or artificial sense,—whether under the license allowed in modern times in applying forms of action they might not be sued in assumpsit—

but it is whether in the sense of the statute of set-off they were causes of action on true implied contract.

In early times the want of a common-law remedy suited to cases of non-performance of simple promises caused frequent recourse to equity for relief; but at length in the 21st of Henry VII it was settled by the judges that an action on the case would lie as well for non-feasance as for malfeasance, and in that way assumpsit was introduced. In theory it was an action to recover for non-performance of simple contracts, and the formula and proceedings were constructed and carried on accordingly. Very early there were successful efforts to apply it beyond its import, and from the reign of Elizabeth "this action has been extended" — as Mr. Spence informs us — " 'conscience encroaching on the common law' — to almost every case where an obligation arises from natural reason, and the just construction of law, that is, *quasi ex contractu* ;" and is now maintained in many cases which its principles do not comprehend and where fictions and intendments are resorted to, to fit the actual cause of action to the theory of the remedy. It is thus sanctioned where there has been no actual assumpsit — no real contract — but where some duty is deemed sufficient to justify the court in imputing a promise to perform it and hence in bending the transaction to the form of action. 1 Spence's Eq. Jur. 243, 244, 245 ; *Hosmer v. Wilson*, 7 Mich. 294 ; *Ward v. Warner*, 8 id. 508 ; *Watson v. Stever*, 25 id. 386, and other cases in this court.

This tendency to apply assumpsit to causes of action foreign to its original spirit and design is apparent in our legislation. The statute allows it to be brought on judgments and sealed instruments (Comp. L., § 6194), also for penalties and forfeitures (§ 6841), and by commissioners of highways for expenses laid out on bridges required to be maintained by private parties (§ 1311). There are other instances in the laws.

The arbitrary use which has been made of the action has caused many incongruities and no little confusion. The practice of strained constructions and the invention of fictions and intendments to subject causes of action to the remedy which were foreign to it, has led somewhat to a confounding of transactions which are not contracts, with those which are, and to a neglect of obvious and necessary distinctions. But it may be observed in passing that it is not the only occasion where inaccuracies have been generated by a too close adherence to the plan of studying causes of action through

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the forms of action. The circumstance that a cause of action in point of fact not *ex contractu* is allowed to be sued in *assumpsit* and to be described as matter of contract and to be loosely spoken of as implied contract is of no more force to fix its actual character contrary to the truth than is the allegation of loss and finding in *trover* to convey the sense of a literal loss and finding. Permission to apply the action to a transaction not involving any real contract relation between the parties cannot change the true nature of the transaction and transform it into matter of contract. Courts cannot make contracts for parties. And the fictions and intendments permitted for the sake of the remedy are explainable whenever necessary.

It seems scarcely necessary to add that the determination by a majority of the court (*Chapman v. Keystone, etc., Co.*, 20 Mich. 358) that the party moving logs as contemplated by the first section of the act of 1861, as amended in 1863, acquires a distinct right of action against the log owners enforceable in *assumpsit*, is of no force whatever to show that such a demand arises on the implied contract.

Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation and not in the nature of the thing itself. *Marzetti v. Williams*, 1 B. & Ad. 415; *Beirne v. Dord*, 1 Seld. 95. To constitute either the one or the other the parties must occupy toward each other a contract status, and there must be that connection, mutuality of will and interaction of parties, generally expressed, though not very clearly, by the term "privity." Without this a contract by implication is quite impossible. Broom's Com. on Com. L., 317; Broom's Phil. of Law, 18, 23, 24, 25, 29, 34; 1 Austin's Juris. 325, 326; 2 *id.* 946, 948, 1018. Cases in illustration are numerous. *Blandy v. DeBurgh*, 6 C. B. 634.

Where there is a spontaneous service, as an act of kindness and no request, or where the circumstances account for the transaction on some ground more probable than that of a promise of recompense, no promise will be implied. The contract connection is not established. *Bartholomew v. Jackson*, 20 Johns. 28; *James v. O'Driscoll*, 2 Bay, 101; *St. Jude's Church v. Van Denburg*, 31 Mich. 287; *Livingston v. Ackeston*, 5 Cow. 531; *Nicholson v. Chapman*, 2 H. Bl. 254; *Smart v. Guardians of the Poor*, 36 E. L. &

E. 496 ; *Otis v. Jones*, 21 Wend. 394, 395 ; *Ehle v. Judson*, 24 id. 97 ; *Ingraham v. Gilbert*, 20 Barb. 151 ; *Eastwood v. Kenyon*, 11 Ad. & El. 438 ; *Hertzog v. Hertzog*, 29 Penn. St. 465 ; *Lange v. Kaiser*, 34 Mich. 317.

The parties must be consenting bargainers personally or by delegation, and their coming together in contract relation must be manifested by some intelligible conduct, act or sign. If not, no contract is shown. *Depperman v. Hubbersty*, 33 E. L. & E. 88 ; *Gerhard v. Bates*, 20 id. 129 ; *Williams v. Everett*, 14 East, 582, 597, 598 ; *Exchange Bank of St. Louis v. Rice*, 107 Mass. 37 ; *Mellen v. Whipple*, 1 Gray, 317 ; *Pipp v. Reynolds*, 20 Mich. 88 ; *Turner v. McCarty*, 22 id. 265 ; *Ashley v. Dixon*, 48 N. Y. 430 ; s. c., 8 Am. Rep. 559 ; *Merrill v. Green*, 55 N. Y. 270 ; *Simson v. Brown*, 68 id. 355 ; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289 ; s. c., 21 Am. Rep. 417 ; *Bank of Republic v. Millard*, 10 Wall. 152 ; *First National Bank of Washington v. Whitman*, 94 U. S. 343 ; *Starke v. Cheeseman*, 1 Ld. Raym. 538 ; *Keller v. Holderman*, 11 Mich. 248 ; *Van Valkenburg v. Rogers*, 18 id. 180 ; *Cundy v. Lindsay*, 38 L. T. Rep. (N. S.) 573 ; *Hills v. Snell*, 104 Mass. 173, 177 ; s. c., 6 Am. Rep. 216 ; *Boston Ice Co. v. Potter*, 123 Mass. 28 ; s. c., 25 Am. Rep. 9 ; *Sullivan v. Portland, etc., R. R. Co.*, 94 U. S. 806. The privity essential to a contract must proceed from the will of the parties. There may be a privity by operation of law where no privity of contract exists. 4 Bouv. Inst., No. 4237.

Before leaving this part of the discussion it will be useful to quote somewhat liberally from the instructive opinion of Mr. Justice LOWRIE, in *Hertzog v. Hertzog*, *supra*. After a citation from 2 Bl. Com. 443, the opinion proceeds :

“ There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this. But it appears in another place, 3 Com. 159–166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract,

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another large class of relations which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in assumpsit.

“It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction.

“The latter class are merely constructive contracts, whilst the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty. We have therefore in law three classes of relations called contracts.

“*First.* Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

“*Second.* Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

“*Third.* Express contracts, already sufficiently distinguished.”

Further on it is also observed that “every induction, inference, implication, or presumption in reasoning of any kind, is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not.”

We may now turn to the statute under which the liability sought to be set off arose and on which it depends. It is part of the first section of the act and provides “that if any person or persons shall put, or cause to be put, into any navigable river, creek or stream of this State, any logs, timber or lumber, for the purpose of floating

the same to the place of manufacture or market, and shall not make adequate provisions, and put on sufficient force for breaking jams of such logs, timber or lumber, in or upon such river, creek or stream, or for running or driving the same, or clearing the banks of such river, creek or stream of the same, and shall thereby obstruct the floating or navigation of such river, creek or stream, it shall be lawful for any other person, company or corporation, floating or running logs, timber or lumber in such river, creek or stream, so obstructed, cause such jams to be broken, and such logs, timber or lumber to be run, driven and cleared from the banks of such river, creek or stream, at the cost and expense of the person or persons owning such logs, timber or lumber, and such owner shall be liable to such person, company or corporation for such cost and expense." Laws of 1863, p. 374.

Now the liability or cause of action here ordained and described is not to arise on contract,—is not to spring from any compact or privity of agreement or any coming together of the parties under any contract relation, or on the footing or in any view of any agreement. The owner of the logs is to become liable without any regard to his will or his assent to the acts and things for which he must pay. His accession to the transaction is not contemplated. He is to become debtor to a party with whom he has never had any contract relation whatever. The statute simply imposes the duty to pay for services which, without the provision, would, as being services purely voluntary, be not recoverable in any way or form.

No case is presented to raise an inference or cause an implication that there was a contract. The demand arises upon a statute, that is, upon a duty which the statute originates, and has no place in the law of contracts. The liability belongs to that class Mr. Justice LOWRIE calls "constructive contracts," and which the civilians denominate "*quasi* contracts," meaning transactions in which the parties make no agreement whatever, but on which the law grounds specific obligations. Poth. on Obligations, pt. I, ch. 1, § 2.

If the demand set up in this case should be considered as arising on contract within the meaning of the set-off law it will be very difficult to draw the line.

The conclusion on this part of the case is that they did not so arise and hence were not lawful matters of set-off. In regard to set-off the right is tied down by the statute to demands arising on

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contract, but assumpsit is not so confined but is allowed an expansive application to cases which do not arise on contract.

[Omitting minor considerations.]

All the objections insisted on have been considered, and no error being shown of which the plaintiffs in error can complain, the judgment should be affirmed with costs.

Judgment affirmed.

The other justices concurred.

FOSTER V. SCRIPPS.

(39 Mich. 376.)

Libel — of city physician — privileged communication.

A publication in a newspaper of a false statement that a city physician, who is appointed by the common council and not publicly elected, has caused the death of a patient by malpractice, is not privileged, and is libellous.

ACTION of libel. The opinion states the facts. The defendant had judgment below.

Griffin & Dickinson, for plaintiff in error.

Henry W. Montrose and *C. I. Walker*, for defendant in error. It is not libellous to charge a physician with neglect or want of skill or proper practice in a particular case, where the charge is made in spoken words (*Townshend on Libel*, § 194; *Poe v. Mondford*, Cro. Eliz. 620; *Foot v. Brown*, 8 Johns. 64; *Garr v. Selden*, 6 Barb. 416; *Tobias v. Harland*, 4 Wend. 537; *Swift v. Dickerman*, 31 Conn. 285; *Johnson v. Robertson*, 8 Port. 486; *Secor v. Harris*, 18 Barb. 425); statements as to official conduct are privileged (*Henwood v. Harrison*, L. R., 7 C. P. 625; *Harle v. Catherall*, 14 L. T. [N. S.] 801; *Odger v. Mortimer*, 28 id. 472; *Davis v. Duncan*, L. R., 9 C. P. 396; *Kelly v. Sherlock*, L. R., 1 Q. B. 686; *Kelly v. Tinling*, id. 699; *Wason v. Walter*, L. R., 5 Q. B. 73; *Turnbull v. Bird*, 2 Fost. & Fin. 308; *Gathercole v. Miall*, 15 M. & W. 318; *Palmer v. Concord*, 48 N. H. 216); malice cannot be inferred from the publication of a libellous statement, but must be proved (*Edwards v. Chandler*, 14 Mich. 471; *Folkhard's Starkie on Slander and Libel*, § 670; Town-

shend on Libel, § 388); whether there is evidence of malice is a question for the court. *Spill v. Maule*, L. R., 4 Exch. 232; *Taylor v. Hawkins*, 16 Ad. & El. 321; *Laughton v. Bishop*, 4 Privy Coun. App. 508-9; 4 Eng. 171.

CAMPBELL, C. J. Plaintiff sued defendant for a libel published in the Detroit *Evening News*, attributing to him gross professional misconduct, resulting in the death of a child. The defense was rested on the claim that the defendant had a right to publish the article as privileged, the plaintiff being one of the city physicians.

The article in question, having referred to the action of the city authorities in providing for general vaccination, stated that the board of health had ordered the use of pure bovine virus, and that the operation should be performed in a certain way which excluded the use of an instrument known as a trocar. It then proceeded as follows:

“Most of the physicians acted under the instructions of the board of health. Several, who thought they could make more money by ignoring the rule, did so. Notably Dr. Foster, the physician of the second district, who preferred to use the “trocar” with which he was enabled to perform vaccinations at the rate of one hundred a day, instead of the twenty or thirty which would have been possible with the proper instrument. He has been several times called to account for his departure from the rules of the board, but has persisted in his course, arguing that the “trocar” was a proper and safe instrument to use. At last a terrible instance has occurred, which completely refutes all the doctor’s arguments. There is no doubt in the mind of any one who has taken the trouble to investigate the case but that James Connelly, the infant son of Mr. Connelly, residing at 162 Seventh street, died last night from the effects of an operation performed upon him some two weeks ago by Dr. Foster. The operation was vaccination; the instrument, the trocar. Mr. Connelly had three children, aged five, two and one year, respectively. Up to about two weeks ago they had been in comparatively good health. Then came Dr. Foster with his trocar and vaccinated them. Soon after all of them were sick, not alone with vaccine fever, but according to the opinion of Dr. F. A. Spaulding, the physician who afterward attended them, also with the scarlet fever. Where did the children get this latter dis-

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ease? There was none of it in the neighborhood. The children were very young and were always kept in or about the house. The fact that the three were taken simultaneously with the same disease, and that it came on simultaneously with the vaccine fever, would seem to prove conclusively that the scarlet fever had been inoculated into their systems by Dr. Foster's trocar which had probably a few hours before pierced the arm of some scarlet fever patient in some remote part of the city.

"A home desolated. One of the children died Monday night. Another now lies at the point of death, and the third may yet die, thus leaving the parents childless.

"The common council should immediately take this matter in hand and cause a thorough investigation to be made into all the circumstances of the case, and if Dr. Foster has been guilty of malfeasance, suspend him from office and cause him to be prosecuted for the same."

After proving the publication of this and some similar articles, and the responsibility of defendant, plaintiff rested. Defendant introduced considerable testimony concerning the course of the common council and board of health, and the different methods of vaccination, and the acts and opinions of plaintiff. The court shut out all testimony offered by plaintiff on these subjects, and upon some other matters which can only be explained by the charge which took the whole case away from the jury, and directed a verdict for defendant without giving any reasons therefor.

The only conceivable ground is the privileged character of the publication, which, as the case stands, would make it lawful, whether malicious or not, and whether founded on reasonable belief or entirely baseless.

We have not been able to discover on what theory the court below based any such charge as was given.

That the article, if not privileged, was libellous, is beyond question. The authorities on the non-actionable character of spoken words, have no necessary bearing on the character of written or printed libels. The doctrine is elementary that written articles, which in any way tend to bring ridicule, contempt or censure on a person, are libellous, and are actionable unless true or privileged. This article not only traced the death of one person and the sickness of others to plaintiff, but laid the blame on his willful misconduct upon sordid motives. It was not claimed on the trial, and the

plea disclaims the truth of the principal charge, that the trochar was used whether its use was or was not improper.

We are therefore not required to discuss the somewhat extraordinary proposition that the city board of health are authorized to determine *ex cathedra* the methods of medical treatment.

The question is simply, whether such false and damaging charges, as have a necessary tendency to ruin the reputation and business of a medical man, may be made without responsibility to legal redress, simply because he happens to be a city physician.

It is not and cannot be claimed that there is any privilege in journalism which would excuse a newspaper when any other publication of libels would not be excused. Whatever functions the journalist performs are assumed and laid down at his will, and performed under the same responsibility attaching to all other persons. The greater extent of circulation makes his libels more damaging, and imposes special duties as to care to prevent the risk of such mischief, proportioned to the peril. But whatever may be the measure of damages, there is no difference in liability to suit.

Allowing the most liberal rule as to the liability of persons in public employment to criticism for their conduct in which the public are interested, there certainly has never been any rule which subjected persons public or private to be falsely traduced. The nearest approach to this license is when the person vilified presents himself before the body of the public as a candidate for an elective office, or addresses the public in open public meetings for public purposes. But even in such cases, we shall not find support for any doctrine which will subject him without remedy to every species of malevolent attack

But where a person occupies an office like that of a city or district physician, not elected by the public, but appointed by the council, and subject only to removal by the council, we have found no authority, and we think there is no reason, for holding any libel privileged except a *bona fide* representation made without malice to the proper authority, complaining on reasonable grounds. The case of *Purcell v. Sowler*, 1 C. P. D. 781, affirmed on appeal, 2 id. 215, is a case as nearly like the present one as is often found; and while the Court of Appeals — on this point differing from the lower court — held the office of public physician gave the public an interest in having it properly filled, it was held no discussion or pub-

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lication was privileged, of facts charged against him, except when made in the course of a lawful proceeding against him.

The good sense of such a rule can hardly be doubted. Every man's reputation is as sacred as his property. He cannot complain when the truth is told. But he can always complain of falsehoods which are not told in an honest attempt to make him responsible to a proper tribunal, or in some other performance of duty. The publication in such cases puts him in a direct way of having the truth established, and the wrong cannot usually be done without furnishing its antidote.

If a medical officer is charged in the public press with professional misconduct, the immediate and necessary effect is to destroy confidence in him and prevent him from gaining a livelihood by his profession. The readers of the paper have no means of investigation and may never have. The charges may never reach an investigation, and he may have no means of compelling one. If he is obliged to put up with such a wrong the consequences will be monstrous. The law cannot recognize any such immunity from responsibility, nor can the rights of individuals be so trifled with.

The case of *Dickeson v. Hilliard*, L. R., 9 Exch. 79, sums up the cases of privilege very neatly and briefly. In that case, without contemplating any petition or other method of examining into the facts, two days after an election, agents of one of the candidates sent to an agent of the other a document charging the plaintiff with bribery. This was held not privileged; and the court, in deciding the point, mentioned the various divisions of privileged communications lying outside of those which were never questioned, and puts them in three classes. The first included such cases as *Harrison v. Bush*, 5 El. & B. 344, where a *bona fide* attempt was made to have a magistrate removed from office by appealing to a person in authority. It was claimed that the application should have been made to the chancellor instead of to a secretary of State, but held that as the queen herself was the acting power, a communication made to either officer was in effect made to her, and privileged, if made in good faith to redress a grievance.

The second class included communications like those made by military officers to courts of inquiry or to the proper authority to aid in the prosecution of such inquiry. *Dawkins v. Lord Rokeby*, L. R., 8 Q. B. 255, affirmed 7 H. of L. 744, was such a case.

The third class included those cases in which information was

given by one who was under a legal or moral duty to give it to another who had a right to ask it. The most familiar instance of this is in answering inquiries concerning servants.

But, as it was very well pointed out, there is no right to make untrue and injurious statements concerning others when they are not made to persons having right and power to investigate, and in an honest attempt to invoke such investigation or answer such inquiry.

In our opinion the libel in the present case was not privileged, and the plaintiff was improperly deprived of his remedy.

The judgment must be reversed with costs, and a new trial granted.

Judgment reversed.

MARSTON and GRAVES, JJ., concurred.

COOLEY, J. The difficult problem in the law of libel is how to reconcile privilege with a proper protection of the rights of individuals. Privilege in the law of libel implies some liberty of discussion and publication, and protection therein even though the discussion proves to be mistaken and the publication materially false. When privilege exists, therefore, individuals whose character or actions are impugned may suffer without remedy, and the plainest principles of justice require that immunity in injurious discussion should be given only within such limits as may be justified on reasonable grounds. There are many cases in which the public benefits of free discussion are so great that privilege must be admitted even though individual injury may be serious; the one overshadowing the other to such a degree that only the public interest can be regarded when it appears that the discussion or publication has been in good faith. But there are other cases where the public benefits of free discussion may be equalled or overbalanced by public evils, and where consequently the allowance of privilege might cause private injuries without any compensating public benefits except such as are offset by public evils. The present is a case of this sort.

The reason for permitting a privilege of discussion in the case of a city physician must be this; that by operating on public opinion through the means of public discussion, the board having power of removal might indirectly be influenced, and a removal brought about in the case of an unfit officer. But if the discus-

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sion proves to be wholly unwarranted by the facts, there is not only grievous private injury, but also serious public injury ; public confidence in an officer whose duties are such as to render confidence extremely important to the continuous useful discharge of his duties, is weakened or destroyed unjustly when it ought rather to have been supported and strengthened. No such counterbalancing evils could exist where the party assailed was simply a person proposed for the office and not an actual incumbent ; and in assenting to the conclusion of the court I confine my concurrence to the exact case before us.

MARTUS V. HOUCK.

(31 Mich. 439.)

Contract — remedy for breach of specifications.

One party to a building contract cannot be compelled to accept work not performed according to the specifications, and to rely on recoupment for his indemnity.

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Moore & Bentley and *S. B. Gaskill* and *W. W. Stickney*, for plaintiff in error.

Geer & Williams, for defendant in error. A building contractor does not forfeit his right to payment if there have been no willful or essential departures from the contract (*Sinclair v. Tallmadge*, 35 Barb. 602; *Smith v. McGluskey*, 45 id. 615; *Johnson v. De Peyster*, 50 N. Y. 666; *Lighthall v. Colwell*, 56 Ill. 108; *Norris v. Sch. Dist.*, 12 Me. 293; *Glacius v. Black*, 67 N. Y. 563; s. c., 10 Am. Rep. 449), and the question whether it has been substantially complied with is for the jury (*Smith v. Clark*, 58 Mo. 145); if it has been, the contractor can recover on the common counts (*Hayward v. Leonard*, 7 Pick. 181; *Allen v. McKibbin*, 5 Mich. 449), the person for whom the building was erected can recoup for the contract price as damages, the loss in value resulting from the variance from the contract (*White v. Oliver*, 36 Me. 92; *Bragg v. Bradford*, 33 Vt. 36), accept-

ance is not necessary to give the contractor a right to recover, as the building attaches to the realty and goes to the owner with his possession of the land, without the formality of delivery and acceptance. *Crookshank v. Mallory*, 2 Green (Iowa), 257.

COOLEY, J. The controversy here arises out of a contract for the building of a house of worship. The defendant in error was the contractor, and sued to recover the contract price, claiming to have fully performed on his part. The building had never been accepted, and the defense was that it did not correspond with the contract.

In the following particulars variances between the contract and the performance appear to have been established: The building was to have fifteen windows, and it had but thirteen. The floor was to be of pine lumber, an inch and a half thick, and it was but an inch and a quarter. Outside doors were to be two inches thick, and they were only an inch and three-fourths. The gallery was to be supported by four posts, and only two were put in. The studding was to be three by eight inches, and some of it was two by eight.

These were the most important variances — perhaps all of them. An excuse was made for the deficiency in number in the posts and windows, depending upon facts amounting to a waiver in strict compliance, the sufficiency of which could not be passed upon by us. No excuse that can fairly be called reasonable was made for the other defects.

The plaintiff counted upon the contract, and also on a *quantum meruit*. The defense insisted that they were under no obligation to receive the building at all until it was made to correspond to the agreement; the plaintiff, on the other hand, claimed to recover the contract price, admitting at the same time the right of the defense to recoup for any deficiencies. The jury gave the plaintiff the contract price with a deduction equivalent to about one-sixteenth part of the whole.

The important questions all arise upon the charge of the court, and to an understanding of that we need only state further that there was some evidence tending to show that the building with such studding as was used was not sufficiently safe for the purpose for which it was erected.

The following instructions were requested by the defendants:

That the church not having been constructed according to the

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contract, and the defendants not having accepted it, they are not bound either to pay the contract price, or to accept it subject to recoupment for deficiencies.

That when parties enter into a written agreement for the construction of a building, they have a right to insist that it shall be constructed according to the contract, and are not obliged to accept and pay for one that does not comply substantially with the contract.

That if defendants must pay for the building, the measure of recoupment would be what it would cost so to change the building as to make it conform to the terms of the contract, and not the difference in value between the building as it is and as it would be if completed according to the contract.

These instructions were refused, but the jury were told in substance that if the building was not completed according to the contract, the plaintiff was entitled to recover, but with such allowance from the contract price as would be equal to the cost of making the building what it was agreed it should be. To this, however, he added the qualification in respect to the studding, that the defendants would not be entitled to tear this out, and substitute at the expense of the plaintiff studding of the size stipulated for, but that the difference in the value of the building, caused by this departure from the contract, the defendants should be allowed for. This qualification we infer was made on the supposition that the cost of making the building what was agreed in this particular would be greater than its importance would justify.

Had the defendants taken possession of this building and applied it to the uses for which they were constructing it, the charge of the Circuit judge would in the main have been applicable to the case and might have been supported. But as applied to the facts of this case it advances a doctrine that is somewhat startling. These defendants contracted for a building of a certain sort, to be constructed according to specifications calculated for durability and strength. It was to be a very plain building, but they had some notions of their own in respect to style, which were to be carried out in the plan. Can it be that the law will permit the contractor to depart from these specifications in noticeable particulars and still compel the defendants to accept the building and make payment for it, subject only to such deductions as twelve men shall believe are equal to the difference in value between the building they bargained

for and the building he decided to give them? Or — which seems to have been more exactly the idea of the instruction — with a deduction equal to the cost of such changes as shall make the building what was agreed upon? Can it be that if defendants required certain things to be done with a view to strength and safety, the plaintiff may disregard these and at last resist the demand for strict compliance by showing that he cannot now do what he should have done before, without great and ruinous cost? If such is the law it becomes of the highest importance to ascertain, if we can, what protection a party can have in entering into such contracts, or whether he can have any at all.

We think the learned Circuit judge was in error in giving the instructions he gave and in declining to give those the defendants requested. The plaintiff had purposely kept the control of the building in his own hands until he tendered it to the defendants as completed according to the contract, and demanded payment of the contract price. Under such circumstances we understand that it was his duty to know that he had performed his agreement, and if defects were pointed out, to correct them. If a door was too light, it was his duty to substitute such an one as was agreed upon, and he had no business to tell the defendants their remedy was, if they did not like his changes, to get somebody else to put in the door they bargained for. If he had inclosed within the walls studding less substantial than the contract required, it was his duty to make the correction, and the expense of doing so, when the fault was exclusively his own, could not be taken into the account by way of excuse. He could not put them to the election of making the expensive change at their own cost, or as the alternative, of occupying in discomfort and fear a house of meeting where they might believe or imagine their lives would be in peril. When they had bargained for such strength in the building as they deemed important in order that they might worship without having their attention distracted by real or imaginary danger every time the wind blew, they had a right to have it, and that too without paying for it twice over merely because other people might think the weaker building just as good or just as safe. They agreed with the plaintiff upon the building they should have, and it is only when he tenders such a building or when they appropriate to their own use something different, that he is in position to bring suit for constructing it.

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The equitable doctrine that every man should pay for that of which he has taken the benefit, even though it was not just what he contracted for, has been fully recognized in this State. *Allen v. McKibbin*, 5 Mich. 449. But we have never held that a man can be compelled to take and use one thing when he bargained for another and declines to receive the substitute tendered. Sometimes the circumstances may be such that he has no choice, especially in the case of improvements upon real estate; but this case is not one of that sort. It is as possible for the plaintiff to put the building in the condition agreed upon as for any one else, and there is no equity in any doctrine which will compel these defendants, if they want what was agreed upon, to hunt up some one else who will contract to make the necessary changes, and who perhaps in turn will demand pay for an incomplete or substituted performance.

In *Willey v. School District*, 25 Mich. 419, we held explicitly that one contracting for a building to be put up according to certain specifications had a right to have what he bargained for. Unimportant variance, may be overlooked or compensated for under a variety of circumstances which are not in question here, but departures from the contract which are susceptible of correction no one can be compelled to overlook or waive. Protection to equities cannot require it, and the acceptance of such a doctrine as the plaintiff here insists upon would take from an unscrupulous contractor the chief inducement to keep his promises. What is it to him whether or not he lives up to his agreement if in any event he may collect for such performance as he tenders, and if the party contracting with him has no choice but to take at some price the building the contractor has seen fit to put up? The sanction the law would give to contracts under such a doctrine would as nearly as possible be worthless.

To suggest an extreme case; if this plaintiff had bargained to put up for one of his neighbors a Gothic house, planned to his taste, and had tendered instead the Gothic house varied with a Mansard roof, or something else equally out of harmony, and been met with a refusal to accept the substitute, we do not perceive why he might not answer with success: "I cannot change this to what was promised, because it would be too expensive; you must receive the building, but if on taking the evidence of the community the preponderance seems to be that this building is of less value than the one I agreed to build, I will pay the difference." This, it

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must be conceded, is doctrine not to be accepted in the law on any concession of its being equitable or just.

The judgment must be reversed, with costs, and a new trial ordered.

Judgment reversed.

The other justices concurred.

CAMPAU V. LANGLEY.

(39 Mich 451.)

Constitutional law — sale of estrays.

A statute permitting the public sale by a public officer of animals found running at large in a public highway, and directing the payment of the proceeds, less the expenses of sale and keeping, to the owner, with a certain time for redemption, is constitutional. (*See note, p. 416.*)

REPLEVIN. The opinion states the case. The defendant had judgment below.

Henry M. Cheever, for plaintiff in error. A statute authorizing private persons to seize animals trespassing on their lands and sell them to satisfy the trespass is unconstitutional. *Rockwell v. Nearing*, 35 N. Y. 308. See, also, *Wynehamer v. People*, 13 id. 395.

Griffin & Dickinson, for plaintiff in error.

MARSTON, J. Plaintiff replevied certain horses under that part of chapter 214 of the Compiled Laws relating to the replevin of beasts distrained. It appeared that the horses were running at large in the public highway opposite lands owned by Langley, who thereupon took them into his custody and possession under the provisions of section 3 of act 184 of the Session Laws of 1877, p. 199; that he immediately notified the town clerk and caused a description of them to be entered in his books, and that the provisions of section 4 of act No. 66, Session Laws of 1875, p. 102, in reference to notifying the commissioner of highways, and giving notice by the latter, were complied with. It farther appeared that by resolution of the board of supervisors, the act of March 27, 1867 (Compiled

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Laws, chapter 59), became operative in the township of Greenfield, and that there was no public pound in the township. Previous to the time fixed for the sale of the horses the plaintiff demanded possession thereof, which was refused, and then brought this action.

Under the charge of the court defendant obtained a verdict and judgment for six dollars.

[Omitting an unimportant point.]

The important question presented relates to the constitutionality of the statutes under which the horses were seized. It is insisted that the act provides for divesting the title of the owner of the property without due process of law.

We are of opinion that this statute is not open to the objections urged against it in this case. The primary object which the legislature had in view was to prevent animals from running at large in the public highways. True, section 3 as amended in 1877 declares it shall be lawful for any person to take into his custody and possession any animal which may be trespassing upon premises owned or occupied by him, but the seizure in this case was not under that provision of the statute. Here the animals were running at large in the highway, and the statute, in authorizing a sale, does not contemplate or provide any compensation to the person seizing the animals, by way of damages for the injury he may have sustained on account of the trespass.

The statute provides that a justice of the peace or a commissioner of highways of the town in which such seizure was made shall be notified, and that he thereupon shall give public notice that such animal shall be sold at public auction, at some convenient specified place, not less than fifteen nor more than thirty days from the time of the affixing of such notice. At the time fixed the justice or commissioner shall proceed to sell the animals for cash, and out of the proceeds thereof he is to retain certain fixed fees for his services in giving the notice and making the sale, together with a reasonable compensation to be estimated by him, to be paid the person making the seizure, for the care and keeping of such animals from the time of the seizure to the sale thereof. The surplus moneys, if any, are to be retained and paid to the owner of the property upon demand made and proof of ownership made within one year after sale. The owner is also given six months following such sale to redeem by paying the expenses of the custody and sale and a reasonable compensation for keeping the same. The act, as originally passed, allowed the person

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who made the seizure, in addition to compensation for keeping, a certain definite sum for making the seizure; but this was omitted in the amendment of 1875.

It is clear, therefore, that the proceedings are not for the purpose of collecting or enforcing the payment of damages for a mere private trespass, but are the usual and ordinary remedy for a particular public grievance.

This case, we think, comes within the principle of *Grover v. Huckins*, 26 Mich. 482, and must therefore be considered as settled by that case.

The only error committed was in limiting the recovery as was done to six dollars, but of this there is no complaint.

The judgment should be affirmed with costs.

Judgment affirmed.

The other justices concurred.

NOTE BY THE REPORTER.—The statute involved in *Rockwell v. Nearing*, 35 N. Y. 302, was like that in section 3 of the Michigan act, and related to cattle doing damage on the premises of another. The court said: "The question whether the act is valid, so far as it relates to the seizure and sale of animals running at large in a public highway, is not involved in the present appeal. That issue might well be controlled by considerations connected with the police powers of the government. No such authority can be invoked in support of its provisions so far as they relate to the seizure and confiscation of animals found on the premises of the captor, as a punishment for private trespass." The law as it then stood did not provide for notice to the owner or a judicial condemnation of the property.

In *Campbell v. Evans*, 45 N. Y. 356, the New York law was held constitutional as to animals running at large in the highway. The court said: "It must be regarded as within the legitimate power of legislative action to protect, by proper laws and under suitable penalties, the public highways of the State, and secure to the people the free and unimpeded use of them. The subject-matter of the act was within the general powers vested in the legislature to pass such acts as, in their judgment will conduce to the welfare of the citizens and the public good; and in its general scope and terms, its purpose and object, it is not repugnant to or forbidden by the Constitution. *Rockwell v. Nearing*, *supra*; *Commonwealth v. Alger*, 1 Cush. 53. The only question on this branch of the case is, whether in the provision made for enforcing the law and giving it practical effect, the act does secure to the party whose property is seized that judicial investigation and determination to which he is entitled under the Constitution, before he can be deprived of his property." "The law does provide for a judicial investigation and a final judgment as a prerequisite to the sale of the property, and only authorizes a sale upon process issued by the magistrate on execution of the judgment." "The legislature had clearly the right to prohibit animals from running at large on the public highways; to enforce the observance of the act by penalties; to make the penalties a lien upon the cattle found running at large in violation of the act; and to authorize a distress and sale of the property for the payment of the penalties. In the act of 1867, they have exercised this power and have by the same act carefully protected the right of the owner, and guarded against a sale by which he would be deprived of his property, except by the judgment of a court in the ordinary course of judicial proceedings, after an opportunity to defend, and upon a warrant to a proper officer in execution of the judgment."

In *Cook v. Gregg*, 46 N. Y. 439, the same law having been amended, by providing for notice and condemnation, was pronounced valid even as to cattle doing damage on the premises of another. The court, after referring to *Campbell v. Evans*, *supra*, said:

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"A reconsideration of the question is not called for at this time; and the judgment then pronounced is decisive of the main question presented by this appeal. Whether the seizure is for an offense against the public, as for running at large in the highway, or a private wrong, as for trespass upon lands, is immaterial. The same procedure is given for the trial of the question involved; and the condemnation of the cattle seized in both cases; and in both, if in either, is 'due process of law,' within the terms, by the Constitution.

"The temporary seizure and holding of the property, awaiting judicial action, is not prohibited by the Constitution.

"That is not a bereaving or a divesting of the owner of his property, and is not forbidden. Property may be attached and held to be disposed of by judicial action, and judgment by such process, or by such agents without process, as the legislature may direct. But no man may be divested, stripped of his property, and the title and right of property transferred to another, except by 'due process of law.' There can be no 'due process of law,' as that term is used in the Constitution, as interpreted and defined by the courts, for the preliminary seizure and detention of property for trial, and to abide the final judgment of a court of competent jurisdiction.

"That it is within the province of the legislature, to prescribe and regulate the remedies for trespass upon lands, is not questioned; and it is not in excess of legislative power, or a violation of any principle of Constitutional law, to give to the party injured a lien upon the property, whether animate or inanimate, found trespassing. This right has existed in the owner of lands from a very early period in the history of the country, from which we have inherited the common law, and has always been recognized and allowed in this State.

"A man finding beasts of another wandering on his grounds, damage feasant, that is, doing him hurt or damage by treading down his grass and the like, may, by the rules of the common law, distrain them till satisfaction be made him. 3 Bl. Com. 7. The proceedings upon such distress are, in this State, regulated by statute, and provision is made for a summary appraisal of the damages by the fence viewers, and an impounding and sale of beasts, or the safe-keeping and sale of inanimate property for the payment of the assessed damages. 2 R. S. 517.

"The process given by the act of 1867 is a very decided improvement upon the summary proceedings under the Revised Statutes, as it gives the owner of the property the benefit of a formal trial after notice, as a condition precedent to a sale; and does not compel a resort to an action of replevin, although that remedy for an unlawful seizure and detention of his property is still open to him.

"Remedies are clearly within the peculiar province of legislation, and may be changed and made to correspond to altered circumstances and new conditions, provided Constitutional restrictions and prohibitions are not invaded.

"The act of 1867 does not impose a penalty in respect to animals found trespassing, and arrested in pursuance of its provisions. It does authorize a penalty when cattle are found running at large in a public highway. The only sums that can be awarded under the act, to the owner of lands, upon which animals are found trespassing, aside from the actual damages sustained, are a reasonable compensation for keeping the animals from the time of seizure to the time of sale, and a small amount prescribed by the act for making the seizure. The statute only provides for indemnity, and it was competent to the legislature to fix the amount to which the party should be entitled for the labor, and loss of time, in seizing the offending animals, and the amount allowed is reasonable. Every other charge upon the animals, or their owner, is for compensation to the justice and constable for official services."

KELLY V. REYNOLDS.

(39 Mich. 464.)

Will — construction of bequest.

A will provided, "To my wife the provision made for her by the statutes of this State I deem sufficient;" and after giving sundry legacies, concluded by giving to the testator's son, "all the residue of my estate after paying the above bequests, legacies, and my debts and the expenses of settling my estate." *Held*, that the wife took such a share as if the testator had died intestate. (*See note p. 420.*)

A PPEAL from order of probate court, dismissing the petition of the executrix, asking for an assignment to her, as executrix, of one-third of the residuum of the estate of the decedent's husband, in the hands of defendant as executor. The order was affirmed below. The opinion states other facts.

Crocker & Hutchins, for plaintiff in certiorari.

Irving D. Hanscom and *A. B. Maynard*, for defendant in certiorari, cited *Miller v. Stepper*, 32 Mich. 194.

COOLEY, J. What did the testator mean by the first clause in his will? is the only question which this record presents. The plaintiff says he meant to have his widow take so much of his estate as would have passed to or been set off to her under the statutes had he died intestate. The defendant, on the other hand, says his intent was that she should take so much only as she would take under the statute after giving effect to all the gifts he makes to others by the will. The difference is important; according to the one construction the widow would share in the personal estate after the legacies to the daughters and the debts and expenses were paid; according to the other the whole of the residue would go to William.

The testator begins his will by saying, "To my wife the provision made for her by the statutes of this State I deem sufficient." If this were the only clause in the will, the widow unquestionably would take as in case of intestacy. The clear purpose would then be held to be that the widow should take the provision the statutes give her: the same provision; no more, but also no less.

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Nothing that by any construction can be held to declare a different intent is found until the residuary clause is reached. By that the testator gives to William "all the residue of my estate, after paying the above bequests and legacies, and my debts and the expenses of settling my estate." This, it is said, gives the whole personalty to William, deducting only bequests, legacies, debts and expenses, and also certain allowances which the statute makes the widow in every case, and over which the testator has no control.—Those allowances the widow has had in this case.

Now the argument for the executor is that the first clause gives nothing to the widow; it merely leaves her to take under the statutes. It does not, therefore, constitute a bequest or legacy; and as William is to have the whole residue, deducting bequests, legacies, debts and expenses only, it follows that nothing can be deducted as a statutory allowance to the widow.

It is not very safe to base arguments upon a supposition that words of art have been employed with technical accuracy in a testamentary instrument. Wills are often drawn by laymen who aim rather to use effective words to express their meaning than to make use of language that will bear nice criticism. If they use expressions that appear to convey clearly to the common mind the purpose to make a particular gift, they are not likely to go to a law dictionary to ascertain whether they ought to call it a devise, a bequest or a legacy. Perhaps if they have a common form book at hand, all these words will be applied to the simplest gift of a chattel. But it is of no importance whatever so that we can clearly see what was meant.

Now in this case the testator made no gift to his wife, and yet it is not unlikely that in his mind it seemed to be a gift. He commences the clause as if it so seemed: "To my wife," he says, as if he were giving. But the real purpose seems to us plain enough. Had he said "the statutes make for my wife if she survives me a suitable and fair provision when considered with reference to the demands of others upon me: I cannot better it, therefore I will not change it," the meaning would have been the same as now. And there would be nothing strange if he were to class a provision thus made with the gifts actually made by his will, applying to them a common term in the residuary clause.

Had the husband's purpose been to cut down the wife's statutory provision, he ought to have said something like this: "To my wife

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I think the statutes give more than she deserves and therefore my will is that she shall have no share in what shall be left after legacies, debts and expenses are paid, but that the whole shall go to the son to whom I have already given my farm." That would have expressed exactly the intent the executor now thinks he discovers in the will. It would, it is true, have sounded somewhat ungracious, but another clause in the will shows that the testator did not hesitate to use plain words. We are unwilling to find in the will any such meaning where a construction consistent with proper feeling is at least equally natural and reasonable.

The cases of *Stineman's Appeal*, 34 Penn. St. 394, and *Adamson v. Ayres*, 5 N. J. Ch. 349, are not unlike the present in some of their peculiarities, and support our view that the construction most favorable to the widow should be preferred.

The judgment must be reversed, and the case remanded to the probate court for proceedings in accordance with this opinion.

Judgment reversed.

The other justice concurred.

NOTE BY THE REPORTER.—In *Adamson v. Ayres*, 5 N. J. Eq. 349, the testator provided that his wife should have her "lawful right of dower out of his estate." *Held*, that she was not merely entitled to dower in lands, but to her statutory third of his estate. The court said: "'Estate' embraces both real and personal property. We are asked to substitute the word 'lands' for the word 'estate.' This would certainly relieve the will from all difficulty of construction, but it would render the whole clause useless, and it would leave no object or motive in the testator for introducing it, but that of putting on the face of the will a clear intention of cutting the wife off from all interest in the personal estate." "The word 'dower' as used in this will cannot be permitted to control the whole clause for the purpose of excluding the widow, against the intention of the testator, from the right which the law would give her in the personal property. The word 'estate' should rather govern or influence the construction of the clause in aid of that intention. The clause being useless if it be supposed to be confined to lands, we ought rather to suppose it was introduced for a purpose, and that a beneficial one to the widow."

In *Stineman's Appeal*, 34 Penn. St. 394, the testator directed that his wife should "receive so much of my estate as she is justly entitled to by the laws of this Commonwealth, and no more." *Held*, that she was not only entitled to her third of the estate, but to \$300 allowed to widows by a statute of 1851. The court say it "of course includes" it.

SCHOOL DISTRICT V. GAGE.

(39 Mich. 484.)

Attachment — public school teachers' wages — holidays.

A school district cannot be garnished for teachers' wages, the statute prohibiting the garnishment of municipal corporations.

Teachers' wages are not subject to deductions for recognized holidays. (*See note, p. 422.*)

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

Geer & Williams, for plaintiff in error. Where usage does not allow a teacher wages for holidays, and his contract is silent as to them, he will not be allowed pay if he does not teach on the holidays (*Smith v. Wilson*, 3 B. & Ad. 728; *Hinton v. Locke*, 5 Hill, 437; *Ford v. Tirrell*, 9 Gray, 401; *Lowe v. Lehman*, 15 Ohio St. 179; *Walls v. Bailey*, 49 N. Y. 464; *Sewall v. Gibbs*, 1 Hall, 663; 1 Greenl. Ev., § 294); municipal corporations may waive their exemption from garnishment. *Clapp v. Walker*, 25 Iowa, 315; *Drake on Attachment* (4th ed.), § 516 *a*; 1 Dill. on Mun. Corp. 187 *n*.

W. W. & M. N. Stickney, for defendant in error.

CAMPBELL, C. J. Gage sued for his compensation as teacher in school district No. 4 of Marathon. Two defenses were set up: *First*, of garnishee proceedings in which the district appeared and submitted to garnishment of the money due to Gage; and *Second*, that deduction should be made for holidays when there was no school kept open.

The garnishee statute relating to justices does not allow garnishee proceedings against municipal corporations. Comp. L., § 6463. A school district is very clearly such a corporation under our laws, as we decided in *Seeley v. Board of Education*, October term, 1876. There is also a further prohibition against such process against public officers for money due by them officially. § 6503. It is not consistent with public policy to subject the stipends of persons in public employments to be suspended or reached in that way, or to

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allow public corporations to be brought needlessly into private litigation.

There is no force to the waiver of objection to the jurisdiction. The exemption really belongs to the person whose debt is garnished and not to the debtor. *Johnson v. Dexter*, 38 Mich. 695. The garnishee cannot without the debtor's consent subject his rights to any unlawful burden.

In regard to deductions for holidays we are of opinion that school management should always conform to those decent usages which recognize the propriety of omitting to hold public exercises on recognized holidays; and that it is not lawful to impose forfeitures or deductions for such proper suspension of labor. Schools should conform to what may fairly be expected of all institutions in civilized communities. All contracts for teaching during periods mentioned must be construed of necessity as subject to such days of vacation, and public policy as well as usage requires that there should be no penalty laid upon such observances.

The judgment must be affirmed with costs.

Judgment affirmed.

The other justices concurred.

NOTE BY THE REPORTER.— The authorities cited by counsel for the plaintiff in error do not sustain his contention. They are as follows:

In *Sewall v. Gibbs*, 1 Hall, 663, indigo had been sold subject to a tare of 10 per cent. The actual tare was 17 per cent. Evidence was held admissible to show a usage in cases of fraudulent packing, to allow purchasers the actual tare.

In *Smith v. Wilson*, 3 B. & Ad. 723, there was a covenant to pay 60l. per thousand for all the rabbits in a certain warren, and evidence was allowed to show that the term *thousand* in that part of the country, as applied to rabbits, meant one hundred dozen, or twelve hundred. This case was doubted by BRONSON, J., in *Hinton v. Locke*, *infra*.

In *Hinton v. Locke*, 5 Hill, 437, an action on an agreement to pay a carpenter twelve shillings a day, it was held that evidence was competent to show that by custom ten hours constituted a day's labor, and that he was entitled to charge a day and a quarter for twelve hours and a half.

In *Walls v. Bailey*, 49 N. Y. 464, action for plastering, proof was held admissible of a custom to charge for plastering without deduction for the openings, such as doors and windows, or baseboards and cornices. And so, in *Ford v. Tirrell*, 9 Gray, 181, of a custom as to measuring octagonal walls like rectangular ones. See note, 18 Am. Rep. 304.

LAKE SUPERIOR IRON CO. V. ERICKSON.

(39 Mich. 423.)

Master and servant — negligence — injury to contractor's employees.

Where a mining company contracts for the removal of ore, but assumes the duty of making arrangements to protect the workmen, it is liable to the contractor's employees for injury in consequence of neglect of that duty.

TRESPASS on the case. The opinion states the facts. The plaintiff had judgment below.

W. P. Healy and G. V. N. Lothrop, for plaintiff in error. Miners are presumed to knowingly incur the ordinary risks incident to mining (*Lehigh Valley Co. v. Jones*, 86 Penn. St. 432; 18 Alb. L. J. 212; *Johnson v. Boston*, 118 Mass. 114); an employer is not liable for injuries to an employee caused by the negligence of a fellow servant, and the relationship of fellow servants does not imply that they are engaged in precisely the same work (*Wilson v. Merry*, 1 H. L. Sc. Cas. 326; *Hall v. Johnson*, 3 H. & C. 589; *Morgan v. Vale of Neath Ry.*, 35 L. J., Q. B. 23; *Howells v. Landore Siemen's Steel Co.*, L. R., 10 Q. B. 62; *Albro v. Canal Co.*, 6 Cush. 75; *Gillshannon v. Stony Brook R. R.*, 10 id. 228; *Gilman v. Eastern R. R.*, 10 Allen, 239; *Russell v. Hudson R. R.*, 17 N. Y. 134); an employer is not liable for the negligence of an independent contractor working for him (*King v. N. Y. C. & H. R. R. R.*, 66 N. Y. 181; s. c., 23 Am. Rep. 37; *Pack v. Mayor*, 8 N. Y. 222; *Blake v. Ferris*, 5 id. 48; *De Forrest v. Wright*, 2 Mich. 368; *Moore v. Sanborn*, id. 519; *Reedie v. London Ry. Co.*, 4 Exch. 244; *Hilliard v. Richardson*, 3 Gray, 349; *Burke v. Norwich R. R.*, 34 Conn. 474; *Corbin v. Am. Mills Co.*, 27 id. 274; *Kelly v. Mayor*, 11 N. Y. 432; *Painter v. Mayor*, 46 Penn. St. 213; *Callahan v. B. & M. R. R.*, 23 Iowa, 562; *Harkins v. Standard Refinery*, 122 Mass. 403; *Connors v. Hennessy*, 112 id. 96; *Wray v. Evans*, 80 Penn. St. 102; *Wilson v. Alleghany*, 79 id. 272); an employer is not liable for unexpected accidents that happen notwithstanding the exercise of care by an experienced foreman (*Ft. W., J. & S. R. R. v. Gildersleeve*, 33 Mich. 134); the negligence of a competent fellow servant is one of the risks assumed by an employee (*Davis v. D. & M. R. R.*, 20 id. 105; *Mich. Cent. R. R. v.*

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Dolan, 32 id. 512; *Warner v. Erie R. R.*, 39 N. Y. 468; *Fellham v. England*, L. R., 2 Q. B. 33); and if the injured person knew of the danger and worked without any special inducement from the principal employer, he cannot recover. *Dynen v. Leach*, 40 E. L. & E. 491; *Mad River R. R. v. Barber*, 5 Ohio St. 541; *Assop v. Yates*, 2 H. & N. 768; *Sullivan v. Ind. Mfg. Co.*, 113 Mass. 396.

George W. Hayden, for defendant in error.

CAMPBELL, C. J. Mrs. Erickson, the defendant in error, recovered a judgment in the court below, as administratrix of her deceased husband, Andrew Erickson, who was killed by a falling rock while engaged in working in the mine of the plaintiff in error, July 9, 1877.

It appears that Erickson had been employed the day before his death as one of a mining gang under the management chiefly of Gustav Stenson, who with his partners had taken a contract for mining and hoisting ore at ninety-five cents per ton for ore and twenty-five cents per ton for rock — this contract having been made July 1, 1877, for a month, and similar contracts having been made in previous months from the beginning of April. Erickson was employed by the day at one dollar and fifty cents per day. The pay arrangement was that the company officers were to pay the men on the certificates of the contractors, deducting this pay from the final settlements.

These contracts were all let by Day and McEncroe as officers of the company, who had general charge for the company of the affairs in the mine.

The pit where these contractors were at work had been carried along the lode so as to leave the upper or hanging wall, which was at an angle of sixty-five degrees, exposed from twenty to twenty-five feet high, and not far from the same distance along the level, with no support or timbering of the hanging wall in that space. Erickson was engaged in sinking a winze or ventilating shaft from this level, and had sunk it about two feet and eight inches when killed. The rock which killed him fell from about half way up the hanging wall, and was just over the winze.

The chief controversy relates to the question whether this rock was previously in a condition which made it so apparently dangerous as to require removal or timbering, and if so, on whom, if any

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one, was the risk and responsibility? Several collateral questions arose also.

Upon a careful inspection of the record we do not think any questions become material except those which bear on the rights and duties of the various parties in connection with the mine. The other errors assigned do not appear to be founded on sufficient showings in the record. The only one urged by counsel was the rejection of a question put on cross-examination to Stenson, asking him whether it was not his business and that of his associates to be on the lookout and watch for dangerous places. We think that when the terms and conditions of his contract were shown this was rather a deduction than a fact, and he could not properly be allowed or required to answer it. He was not precluded from explaining fully the mutual understanding of the contracting parties as to what the contract was, or as to usage.

It was claimed on the argument, and this claim is based on the assignments of error, that on the whole case there was no ground of recovery. And as reasons for this position several legal propositions are advanced which are chiefly as follows: That there could be no recovery if Erickson was in the employ of Stenson as a day laborer; or if he was not under control of the company or its officers, and if Stenson and his associates were to mine and do their work properly; or if he was willing to work after such examination as was shown. And it was claimed in various forms that Erickson undertook all the risks that were established. It will be more convenient to refer to the points raised in the way adopted by counsel than to pursue every subdivision separately.

There was evidence that the rock in question had been considered as dangerous some time before the contract of July, and that the attention of Day and McEncroe had been called to it. There was evidence of various attempts by sounding it with an iron bar to ascertain its safety. There was conflicting evidence as to some of the declarations of the mining officers on this subject. There was evidence on one side that they expressed themselves decidedly on its safety. There was also evidence to go to the jury that they retained the right to determine what large rocks should be removed and what timbering or propping should be done. There was also testimony of the increase of water oozing from the seams, claimed to indicate a gradual loosening. The theory of plaintiff in error was that the rock had been started by blasts from the winze, and that sufficient care had not been

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taken to examine it thereafter. It fell about two hours after a blast. Other matters of fact will be referred to in their place.

It is proper first to consider the respective positions of the parties. Day and McEncroe stood in the place of the mining company in making these contracts. There was no employment relation between them and Erickson, who was laboring under the contractors. So far as this changed the relative liabilities of the parties it must operate in this case. But while there are cases in which there is no duty or legal privity between principals and the servants of those who contract with them, this lack of privity is not universal and absolute. If, for example, a railway company were to contract with a firm of car-builders to build cars according to given plans in places under the entire control of the builders, there could be no possible corporate responsibility for injuries received by workmen in their callings. But on the other hand it might be quite possible for men to be employed in piece-work in the shops of such companies where they retained more or less control, when for the failure of a corporate duty the workmen or strangers injured by that failure might have a cause of action for the wrong directly against the corporation, although it had not employed them. The case of *City of Detroit v. Corey*, 9 Mich. 165, is a case where the corporation was held liable for neglect of a contractor in not properly guarding against danger from an excavation in a public street. The same principle was applied in *Darmstaetter v. Moynahan*, 27 Mich. 188; *McWilliams v. Detroit Central Mills Co.*, 31 id. 274; *Gardner v. Smith*, 7 id. 410; *Bay City & E. Sag. R. R. Co. v. Austin*, 21 id. 390; *Continental Imp. Co. v. Ives*, 30 id. 448; *G. R. & Ind. R. R. Co. v. Southwick*, id. 444.

No doubt the range of the owner's responsibility is very much less in most cases where contractors are employed and have their own servants at work, than where the servants are employed by the proprietors. The main question in such cases is whether any duty remained which sprang from the proprietor's own position and from the violation of which the damage arose. In the present case there are two principal inquiries, which are *first*, whether the death of Erickson was due to the fault of the mining company in not doing what they were bound to do for the protection of those working in their mines; and *second*, whether Erickson himself was responsible for running the risk which proved

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fatal. Of course both of these questions are aside from the third question, whether the death was accidental, and not due to the fault of any one.

The court below told the jury that there could be no recovery in this case if the duty was on Stenson and his associates to guard against such risks, and that the same was true if Erickson contributed to the injury by his own want of care. They were also told that there was no ground of recovery if the falling of the rock was not under circumstances which showed that the company had been guilty of such negligence as showed such want of care and caution as prudent persons would not be guilty of. They were particularly directed that unless the conduct of Day and McEncroe was thus negligent and the cause of the mischief, there could be no recovery, and that the company would be liable for their neglect or misconduct and not for that of any one else appearing in the case.

We think the court was correct in holding that Day and McEncroe represented the company for this purpose. They appear to have had entire control of all the business that is involved in the record. And we think there is no room to question the propriety of these rulings if they were applicable, and not neutralized by other instructions. In this connection it is proper to notice one of the special assignments of error which is calculated to give a wrong impression. The court is represented as telling the jury to inquire whether the company used such care and precautions as "relieved them from liability in this suit," and it is claimed this left a question of law to the jury. But the next sentence of the charge explained what would or would not make them liable. Isolated sentences cannot be allowed to be considered apart from their context. The instructions were not so separated as to create confusion, but were really but a single and correct ruling.

We think that unless the case was one too plain to go to the jury on that point, it was properly left to them to say whether the accident occurred without any one's fault or neglect. It is not for us to draw inferences of fact in such cases. There was certainly evidence to go to the jury indicating that there should have been measures taken by some one to either remove or prop the rock that fell.

We think also that there was properly before them a question whether Erickson himself was guilty of contributory negligence. A great deal of testimony was introduced to show that there was no

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apparent danger which could be discovered, and that the company was justified in treating the rock as safe. There was also much testimony to the contrary. The place was one not easily examined by the ordinary mining lights. If there was no apparent danger it was not recklessness to work under this rock. If on the other hand there was real danger and Erickson was informed of it on the day he entered the mine, there was nevertheless evidence that those about him, who had practical knowledge of the mine in which he was a stranger, acted as if they did not think so, and the guards usually to be expected against danger were absent. The duty of examining such places after a blast is confined by the testimony to dangerous places, and not made out clearly even there as devolving on Erickson. The jury have necessarily found he was not careless, and there was testimony on which they could lawfully act.

The question next arises whether the responsibility of protecting Erickson from such a danger, if supposed to exist, rested on his immediate employers. This was also dependent on testimony, and involved some inquiry into their relations with the company.

Does it then appear, so as to bind the court and jury, that the contractors in this particular service had the responsibility confined to them, of guarding their workmen from the probable dangers of their employment? There is no dispute in this case upon the general principle of law that a responsibility lies somewhere to prevent workmen from being exposed, without such protection as is reasonably required in a dangerous business. The law is very clear that it is culpable negligence to avoid keeping mining works as well protected as usual prudence would dictate. And there is no doubt that a common danger in mines is from falling rocks. The hanging wall being on an angle—in this instance of 65 degrees—with the level, any lack of cohesion in its parts must lead to the fall of such part of it as is seriously loosened, and that fall must be hastened by the concussion of the air or the blows of flying rocks thrown against it by blasting below and near it. In the present case the rock which fell being directly above the winze, and only about twelve feet from its mouth, every blast in that shaft would necessarily throw more or less rock against this sloping roof; and this must continue until the shaft is either finished or opened to such a depth as to deaden or destroy the upward force of the explosions.

The fact that this rock was considered dangerous and so reported

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several weeks before the accident, and the further fact if true (and the jury probably believed it) that there was a perceptible increase in the dangerous symptoms, certainly imposed a duty of either removing the real danger or using such means as are generally deemed adequate to determine whether any danger existed. The further fact that the hanging wall was composed of a species of rock whose thickness was not generally found uniform, and which was sometimes thin enough to possess no very great resisting power to shocks or disintegrating agencies, was one which could not be left out of view by any prudent calculation. A broad expanse of some twenty-five feet square of rock, only supported by its own cohesive power from falling may, according to the testimony, have weak points where it may give way unless propped, or unless the unreliable mass is removed. There was testimony, which it is not our province to pass upon, which indicated, if believed, that no reliable test could be found for determining the solidity of the rock when water was escaping through such seams as existed in this wall.

We think there was a question fairly open whether neglect to guard against the accident was not culpable. The jury have found it was.

If so, the only remaining question is whether the jury had proof before them whereby they could lawfully hold the company to this responsibility.

Under the contracts shown by the proofs, the contractors had nothing to do with planning the mine or selecting their working ground, unless with very small discretionary choice. The shafts and levels and the winze must necessarily have been determined on by the owners of the mine, and the mining gang worked on short contracts. Their business, except in sinking the winze, was merely stripping the lode of its ore, and the winze was apparently, as it must usually be, down the lode. The pay for getting out dead rock was but little beyond one-fourth that of getting out ore, and work in the rock outside of the lode was not contemplated. They testified, and the jury must have believed them, that the company reserved the power of determining when and where dangerous rock in the wall should be removed, it requiring removal by blasting, and of locating the supporting pillars or placing timbers to prop the wall. Such timbering would be expensive, and is not provided for by the contracts which are confined to rock and ore blasting and

removal. Either the mine must be unguarded, or else, on this state of facts, the company must guard it.

Under such circumstances it is very plain that the company, being the owners of the dangerous property, and inviting men to work on it, their responsibility for its protection cannot be changed by the fact that the work is done by the ton instead of by the day, or by the fact that the men who contract with them have laborers of their own. By employing men to act for them in either way they hold out the assurance that they can work in the mine on the ordinary conditions of safety usually found in such places. They guarantee nothing more than is usual among prudent owners, and they do not insure against that which is purely accidental. But they do tacitly represent that they have not been and will not be reckless themselves.

If men choose with their eyes open to run into danger they may forfeit claims to redress. But it cannot be considered reckless in men who are in doubt upon a matter which cannot be determined absolutely, to pay some regard to the opinions and assurances of those who are supposed to have, and by their position are bound to have special knowledge called for by their larger responsibilities. In the present case the assurances of safety given by the mining agents cannot be disregarded, and were rightly subject to consideration by the jury.

We think the jury were very carefully and correctly instructed concerning their duty, and that there was testimony which warranted their verdict.

There is no error in the record, and the judgment must be affirmed, with costs.

Judgment affirmed.

The other justices concurred.

CORDES V. MILLER.

(39 Mich. 581.)

Landlord and tenant — covenant to rebuild — discharge of.

A lessee of a wooden building, covenanting to rebuild in case of fire, is released by the enactment of a valid ordinance prohibiting the erection of wooden buildings.

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Cordes v. Miller.

ACTION on a lease. The opinion states the case. The plaintiff had judgment below.

J. W. & O. C. Ransom and T. B. Church, for plaintiff in error.

Taggart & Wolcott, for defendant in error.

COOLEY, J. Miller on the 4th day of October, 1872, rented of Cordes, for the term of ten years, a wooden building in Grand Rapids, at a specified annual rent. The lease contained a covenant on the part of Cordes that "if said building burns down during this lease, said Cordes agrees to rebuild the same in a suitable time, for said Miller." Miller went into possession and occupied the building for a restaurant and saloon until May 26, 1874, when it was destroyed by fire. Within a week Miller notified Cordes to rebuild, and some preparation to do so would appear to have been made by the removal of the debris of the fire. June 15, 1874, the common council of Grand Rapids passed an ordinance prohibiting the erection of wooden buildings within certain limits which embraced the site where the burned building had stood. Cordes afterward went on prepared plans and specifications for a larger brick building, and contracted for putting it up. Miller declined to examine the plans or to say any thing about them, but in substance he said that when the building was completed, he would move into it. It was completed in November, and in December Miller moved into a part of it, which was considered by the parties as being equivalent to the old building. Complaining then that the new building was not put up in a suitable time, he brought this suit on the covenant.

The principal question in the case is whether such a suit can be maintained. No question is made of the validity of the city ordinance, and it is urged on behalf of the lessor that as the putting up of such a structure as was originally leased was thereby rendered impossible, the covenant was discharged. *Brady v. Ins. Co.*, 11 Mich. 425. On the other hand it is argued that rebuilding is not impossible; it is only rebuilding of a specified material that is forbidden; and that Cordes, when he rented his building and agreed to rebuild in case of fire, took upon himself all the risks of being compelled to make use of some other material than wood, as much as he did the risk of the rise in the cost of materials. Some

stress is also laid upon the fact that the lease did not mention the material of which the old building was constructed. The court below sustained the action.

If this judgment is correct, then Cordes had placed himself under legal obligation not only to put up a new building of some more substantial material than wood, no matter how much greater might be the cost, and to turn it over to Miller for the term at the same rent, no matter how much more the occupation might be worth. Moreover he would be obliged to reproduce the old building, as near as the change in the material would permit, and could not compel his lessee to accept a building differently planned, subdivided and arranged, even though it might be better and at least equally convenient. In other words, in the enforced change of material Cordes could not consult his own interest in making such modifications as the change would be likely to render important and desirable, but would be tied down to the plan and arrangement of a building which it might be well enough to reproduce in the old material, but which would never be chosen if the material were to be brick, stone or iron.

We cannot think this the fair construction of the lease. Cordes covenanted to rebuild, if destroyed by fire, the building he leased ; but did not covenant that if not allowed to rebuild that, he would put up another on the same plan, of more substantial and presumably more costly material. Had the exact contingency which has since happened been in the minds of the parties at the time, it is scarcely conceivable that the lessor would have consented to put up a brick building in place of the one leased, and to receive for it the same rent the wood building brought him, when its probable rental value would be considerably greater, and its cost presumably more.

Had this been an agreement by a builder to rebuild the old building, it would scarcely be urged that the covenant would bind him to erect a new one differing from it so radically as would a brick or a stone structure from one of wood. Had Cordes been selling this land to Miller with a similar agreement respecting the building, it would be equally plain that the change in the law could not work a change in his contract so seriously increasing his responsibility. But in principle the cases suggested would not differ from this in the least. Cordes undertook for something which by a change in the law has become illegal ; and his covenant has thereby been discharged

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In this case Cordes prepared accommodations for Miller which the latter has accepted and now occupies. But they were different from the old, and Miller could not have been compelled to accept them. The arrangement was therefore one outside the lease — not one in compliance with its terms. Probably the course of the parties has in effect been equivalent to an offer on one side and an acceptance on the other of the new quarters in place of the old and under the old lease ; but no question concerning that arrangement arises here.

The judgment must be reversed, and judgment entered for Cordes with costs of both courts.

Judgment accordingly.

The other justices concurred.

CAMPAU V. NORTH.

(39 Mich. 606.)

Statutory construction — evidence — physician's disclosure.

Under a statute prohibiting the disclosure by a physician of information acquired in professional attendance and necessary to enable him to prescribe, in an action for damages for a personal injury by defendant's violence, a physician is not precluded from divulging the plaintiff's admission to him that the injury existed before the defendant's act, unless it affirmatively appeared that the disclosure was necessary to enable him to prescribe. (*See note, p. 435.*)

TRESPASS on the case. The opinion states the case. The plaintiff had judgment below.

Alfred Russell, for plaintiff in error.

J. W. Donovan and *J. Logan Chipman*, for defendant in error.

GRAVES, J. The plaintiff in error being an invalid procured defendant in error to attend him in capacity of a nurse. She remained about two weeks and a half and went away. Some time thereafter she brought this suit upon the case to recover for various personal injuries, and among them for a rupture caused, as she

alleges, by his blows and other acts of violence against her while she was acting as his nurse. The jury returned a verdict in her favor for \$1,500, and error is charged.

When upon the stand as a witness in her own behalf she testified that she was in good health when she began for the plaintiff in error, but after leaving was sick and ruptured, and that such injuries were caused by his personal violence.

On cross-examination she was asked if she had not at a specified time and place admitted to Doctor Lichty that she had been ruptured before going to nurse plaintiff in error, and that he had not caused the rupture of which she made complaint, and she replied that she had not.

Dr. Lichty was afterward called for plaintiff in error, and having testified that he was employed and acted as her physician after she left plaintiff in error, that he had charge of her case and that all the facts which had come to his knowledge of and concerning her had been acquired by him while attending her in his professional capacity as her physician, was tendered as a witness to prove that she admitted to him at the time and place specified in the question put to her, that she had been ruptured before she went to live with plaintiff in error and had not been ruptured by him. The offer was objected to by the counsel for the defendant in error on the ground that it was within Comp. L., § 5943. The section is in these terms :

“ No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which *information was necessary to enable him to prescribe for such patient as a physician*, or to do any act for him as a surgeon.”

The court sustained the objection.

The objection and ruling were based on the statute. The common law gives no privilege in such a case. 1 Greenl. Ev., § 248; 1 Whart. Ev., § 606; 1 Stark Ev. (Phil. ed.), p. 40 mar. 2 Best Ev. (1st Am. from 6th Lond. ed.), § 582.

The rule given by the statute is beneficial and based on elevated grounds of policy, and it ought not to be frittered away by refinements. It is not to be forgotten, however, that parties have their rights, and that when one takes the stand as a witness to establish by his or her oath the cause of action alleged, the state of facts to give immunity under the statute ought to appear distinctly before making any exclusion of proof of contradictory admissions. So far as

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practicable, the courts ought to see to it that the statute is not used as a mere guard against exposure of the untruth of a party, and that a rule intended as a shield is not turned into a sword.

The objection in the present case was not warranted by the facts in the record. The offer was to show Miss North's admission that her rupture was not caused by plaintiff in error but existed before she went to live with him. This was material, and it does not appear in the record, from the doctor's testimony or in any way, that in case she made the admission as to the pre-existence of the rupture, and as to its not being caused by plaintiff in error, it was information "necessary to enable the doctor to prescribe for her as a physician or to do any act for her as a surgeon." And yet this is one of the fundamental conditions for exclusion which the statute specifies.

The objection that the court refused to strike out the testimony of the other medical witnesses requires no notice.

The case was given to the jury upon an implication that it would be competent for them to find that the breach, of which defendant in error complained, existed before she went to nurse plaintiff in error and was aggravated by his violence and abuse. There was no basis for any such theory. Miss North testified, as before stated, that she was well when she went to live with plaintiff in error, and that the rupture was caused by the violence she received there, and this was her case as set forth by the declaration. All her witnesses who testified about it agreed with her on that point, and no evidence on the part of plaintiff in error was admitted which had any tendency to prove that he injured her by aggravating a pre-existing rupture by his assaults.

For the errors mentioned the judgment must be reversed with costs and a new trial ordered.

Judgment reversed.

CAMPBELL, C. J., and COOLEY, J., concurred ; MARSTON, J., did not sit in this case.

NOTE BY THE REPORTER.— In *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, the Court of Appeals have given a construction of the statute prohibiting physicians from disclosing information acquired by them in attending patients in a professional capacity, and necessary to enable them to prescribe for such patients. The physician who attended the insured in his last illness, having testified that he died from nervous apoplexy, was asked, "state what causes will produce that?" Another physician was asked to "state what the disease is?" and by him it was proposed to be proved that the disease could only arise

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from causes of long standing. Another physician, who knew him well and had long attended him, was asked, "was he cured when he left your hands?" "In the month of May, 1867, in your opinion, was he a man in good health and of sound body, and one who usually enjoyed good health?" "Excluding any knowledge or information that you obtained while treating him, and judging from his appearance from that time until 1867, what is your opinion as to whether he was a man in good health, of sound body, and a man who usually enjoyed good health?" These offers were made to show a breach of warranty and were all excluded under the statute. This is now pronounced error. The court deemed that the exclusion of the first two questions was erroneous, without regard to the statute. As to the others they say, by EARL, J., that it must appear not only that the information was acquired during professional attendance, but was such as was necessary to enable the physician to prescribe. As to the third and fourth they say also that it did not appear but that the information asked for had been acquired by reason of intimate and general acquaintance, rather than professional attendance. "It is not incumbent," remark the court, "on the party who seeks information from a physician, who has been in attendance upon a patient, to show that the information was not acquired as specified in the statute, but the party objecting must in some way make it appear, if it does not otherwise appear, that the information is within the statutory exclusion. It will not do to extend the rule of exclusion so far as to embarrass the administration of justice. It is not even all information which comes within the letter of the statute which is to be excluded. The exclusion is aimed at confidential communications of a patient to his physician, and also such information as a physician may acquire of secret ailments by an examination of the person of his patient. The policy of the statute is to enable a patient without danger of exposure to disclose to his physician all information necessary for his treatment. Its purpose is to invite confidence and to prevent a breach thereof. Suppose a patient has a fever, or a fractured leg or skull, or is a raving maniac, and these ailments are obvious to all about him, may not the physician who is called to attend him testify to these matters?" "Before information, sought to be obtained from physicians, witnesses, can be excluded, the court must know somewhat of the circumstances under which it was acquired, and must be able to see that it is within both the language and the policy of the law." EARL, J., was also of the opinion that certain other evidence of a breach of warranty should not have been submitted to the jury, but that a nonsuit should have been granted. CHURCH, C. J., and RAPALLO and MILLER, JJ., concurred in the result on the ground that the rulings on the questions of evidence referred to in the opinion were erroneous; by which we understand simply that they did not embrace the views of the opinion upon the question of non-suit. The other three judges took no part. This, of course, is not a very authoritative decision. The distinctions, if any, between this case and that of the *Same Plaintiff v. Mutual Life Ins. Co.*, 67 N. Y. 185, are delicate. It was there held that the statute prohibits the disclosure not only of information derived from statements of the patient, but from statements of others present, or from his own observation; and consequently the physician was prohibited from testifying that prior to the application the insured was afflicted with certain diseases for which the witness treated him, although the testimony was expressly limited to what the witness knew independent of information or statements by the insured. (The language of the question in the present case was "excluding knowledge or information obtained while treating him, and judging from his appearance.") The court there said, "the point made that there was no evidence that the information asked for was essential to enable the physician to prescribe is not well taken, as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient." It seems rather difficult to reconcile this with the language of the opinion in the principal case on the same point, namely, that the party objecting must make it appear that the information is within the statutory exclusion. In the former *Edington* case the court said: "The statute in question, being remedial, should receive a liberal interpretation." In the present case they say: "It should not be made broader by construction than the language plainly requires." But Judge EARL, who writes the present opinion, seems to have concurred in the former, which was written by Judge MILLER. In the former, the chief judge concurred only in result, and FOLGER and RAPALLO, JJ., took no part.

But the construction of the statute was settled in that court, and contrary to the doctrine

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of the principal case in *Grattan v. Metropolitan Life Ins. Co.*, Feb. 24, 1880. The court say ; "The remaining inquiry relates to the exclusion of evidence offered by the defendant for the purpose of showing disease in the mother and sister of the life insured, and therefore the falsity of his representations. It was offered from two sources ; first, physician, and second, layman. As to the physician, the inquiry is answered by the statute. Its very language sustains the ruling of the referee. 'No person,' it says, 'duly authorized to practice physic * * * shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician.' The object of this statute defines its limits : it is operative between persons named and applies to a certain state or condition of facts ; it operates between the physician and his patient whenever that relation exists, and its object is to compel secrecy as to any information so acquired by the physician in attending his patient and which was necessary to him while acting in that capacity. It expresses the will of the legislature ; and the duty of the court is one of verbal construction only. Is the present case within it ? In answer to the question, 'Have either of his parents ever had pulmonary, scrofulous or other constitutional diseases,' the answer was 'No,' and as to his mother, the cause of her death was said to have been 'fever after confinement.' The answers are found in the medical examiner's certificate, but it is claimed that they should be regarded as coming from the life insured ; and for the purpose of the discussion before us, I shall so consider them. The defense alleges that these answers were false because, as it alleges, 'his mother and sister had died of consumption.' To maintain this issue the defendant called Dr. Sheppard and proved by him that he was a practicing physician, that he attended the mother of the life insured in 'her last illness in a professional capacity.' The defendant thus established that the relation between the mother and the witness was that described in the statute — of physician and patient. There is no evidence to show that the witness had any earlier or other acquaintance with her, or that he knew or visited or saw her at any other time or in any other capacity. So far as appears his introduction to her occurred for the first time when he was thus called to her in his professional capacity. Thereupon the following questions were put to him :

" '1st. Do you know and are you able to state the cause of her death?'

" '2d. Did you observe the symptoms that she exhibited in her sickness?'

" '3d. Were the symptoms of the disease such that you might have discovered it without the aid of any specific statement made by the patient ; that is, by observation and physical examination, could you have ascertained the character of the disease?'

" '4th. Were the symptoms of her disease such that you might have discovered them without their being confidentially disclosed to you by Mrs. Peter Grattan or any friend or attendant, or through any private examination?'

"Defendant's counsel then read the statement of the life insured that the cause of his mother's death was intermittent fever after childbirth, and then asked the witness: (5) 'Is this statement true?'

'This question was asked this witness: (6) 'Did you ever treat Mrs. Grattan for intermittent fever, and if so, did you treat it as the radical disease or as an incidental symptom?'

"These questions, so far as they are material, come so strictly within the prohibition of the statute, that an extended discussion of the reasons or ground of exclusion would be out of place.

"The first and second questions were preliminary, and standing by themselves, unimportant. We may assume they would have been answered in the affirmative, and in view of his profession and the relation the witness bore to his patient, it would be a necessary inference that his knowledge of the cause of her death was acquired, and his observation of the symptoms exhibited in her sickness, made by him in his character of physician. The third and fourth questions were immaterial, except as the answers might lead to other questions — as I assume they would have done — calling for the result of such discovery and observation as might have been made under the conditions assumed by the questions. The matter thus called out would be disclosed in violation of the law. The third question is of two clauses ; the second clause limits or explains the first, but however considered was inadmissible. The observation which he might have made, and the physical examination to which the patient was subjected, were permitted to him in his character of phys-

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physician and not otherwise. Though the patient had been dumb, it would make no difference. The communication to his sense of sight is within the statute as much so as if it had been verbal and reached his ear. It needs not that the examination should be private. It is enough that the witness acquired the information in his character as physician and in the due and proper exercise of his calling. Nor was it necessary for the plaintiff to show in the first instance, by formal proof, that the information was necessary to enable the witness to prescribe. Such, under the circumstances of this case, is the inevitable inference.

"In *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 183, the question at this point was thus disposed of. Evidence was there offered to show by certain physicians that the life insured was afflicted with disease, and it was urged 'that the testimony they would give was based on knowledge which they obtained solely from their attendance upon him as physicians, and not from any information received from him.' It was excluded, and MILLER, J., speaking for the court upon appeal, holds that it was rightfully rejected, and with other words to the same effect, says: 'The point made, that there was no evidence that the information asked for was essential to enable the physician to prescribe, is not well taken, as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient. When it (the statute) speaks of information, it means not only communications received from the lips of the patient, but such knowledge as may be acquired from the patient himself, from the statements of others who may surround him at the time, or from observation of his appearance or symptoms. Even if the patient could not speak, the astute medical observer would readily comprehend his condition. Information thus acquired is clearly within the scope and meaning of the statute.'

"The doctrine thus enunciated was reiterated and enforced in *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256, and *Cohen v. Con. Life Ins. Co.*, id. 308. So far, therefore, as the questions marked one to four, excluded by the referee, are concerned, he followed the statute and decisions of this court in his ruling.

"It is urged, however, by the learned counsel for the appellant, that no professional medical action is needed after death; that the event severs the relation of physician and patient, and that consequently, information of the cause of death cannot be acquired to enable a physician 'to prescribe' for a patient.

"The case before us is not one where the witness was called in for the first time after the death of the patient, but one where the lips of the physician were sealed during the life of the patient, and where, although by death he loses the patient, his lips must remain closed.

"It was held under the old law that the seal must remain until removed by the patient; and it is now so provided by statute. Code of Civil Procedure, § 836.

"The witness learned the cause of his patient's death while attending her in a professional capacity, and as it must be inferred, from the symptoms caused by the disease. The remaining, or fifth and sixth questions, were objectionable, for the same reasons. Whether the statement of the life insured as to the cause of his mother's death was true or not, could be answered, if at all, by the witness by an opinion formed from his observation while an attending physician and information obtained as such.

"There was no statement by the life insured nor any issue before the referee, which made material the inquiry whether 'the witness had ever treated Mrs. Grattan for intermittent fever, and if so, whether he had so treated it as the radical disease, or as an incidental symptom.' If regarded as part of the general purpose to show the real cause of death, it comes within the exclusion of the statute, and concerning it the witness was not competent to speak.

"In *Sloane v. N. Y. C. R. R. Co.*, 45 N. Y. 125, the plaintiff sued to recover damages for injuries sustained by him in consequence of the negligence, etc., of the defendant, and among other items, claimed the amount of his physician's bill. The defendant's counsel, on the cross-examination of the physician, asked 'whether the plaintiff had the venereal disease while under his care as a physician,' and its exclusion by the trial judge was urged as error and ground for a new trial. This court — the chief judge delivering the opinion — held no error. 'We think,' he says, 'this was privileged under the statute. The question did not, in terms, ask for any communication from the plaintiff, but it was an inquiry as to the existence of a disease which the plaintiff had while under the care of the witness as a

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physician. The presumption is, from the question, that he learned it as a physician for the purpose of prescribing. The question itself implies it. To require the plaintiff to make the preliminary inquiry whether he learned the fact for the purpose of prescribing would, in effect, if the fact existed, have deprived the plaintiff of the protection of the statute. It would have proved the fact indirectly, which might be as injurious as if proved legitimately.'

"In *Briggs v. Briggs*, 30 Mich. 34, it is said: 'He had no knowledge upon the subject except what he obtained in the course of his professional employment. * * * We do not understand the information here referred to, to be confined to communications made by the patient to the physician, but regard it as protecting, with the veil of privilege, whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose.' On the other hand, in *Edington v. Aetna Ins. Co.* (manuscript opinion by EARL, J.), the question addressed to the physician was held proper by the learned judge, because, as is there stated, 'it does not appear that he discovered that disease or learned its nature while attending him (the life insured) professionally. He saw him frequently before he attended him and saw him after he ceased to attend him, and the court could not say that he could not answer without disclosing the necessary information which he had obtained while in professional attendance upon him.'

"In the case before us, the referee has presented for examination a witness who was first called to the sick woman that he might discover her disease. He learned the nature of it that he might treat her, and watched the symptoms as they developed and terminated in her death. It was for such a purpose and during this time only, that he saw her; and during all this time he attended her as her physician. He had acquired knowledge in no other capacity, nor for any other purpose. He had none, therefore, that he could disclose. His diagnosis was made upon her employment, and whether aided in this by visible sign or audible communication, can make no difference. Whatever opportunity he had for knowledge concerning her was afforded by his employment, and its import was necessary to him that he might, to her advantage, practice his art, or, in the language of the statute, 'prescribe' for her. The information so obtained must remain inclosed with him, for he is forbidden by statute to 'disclose' it. The word must be taken in its fullest sense. He must not tell it; not because the patient declared the communication to be confidential, or because the physician considered it so, but because the statute says that the communication to him shall not be by him disclosed or told. Any other rule will annul the statute and permit it to be evaded. I confine these observations to the case in hand, or one similar, where communications begin with and follow the employment of the physician, and are the result or consequence of the relation he sustains to his employer or patient. The court need lay down no rule; the statute is the rule and we are merely to inquire whether the case comes within it. If it does, we should abide by it; for, in the language of CRAWFORTH, V. C., in *Balguy v. Broadhurst*, 1 Sim. (N. S.) 111, 'I am sure that it is most inconvenient to have a rule laid down and the courts struggling to avoid it.' Its object is a beneficent one, 'It rests on obvious principles of convenience and policy.' 1 Stark. Ev. 103; *Wilson v. Rostall*, 4 D. & E. 700, per BULLER, J., and it should be so construed as to carry out that object effectually, and so far as the language will admit, as to reach and defeat all attempts to do, in an indirect or circuitous manner, that which it has prohibited. It must be understood as extending to all such circumventions and rendering them unavailing."

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(30 Mich. 626.)

Fishery — common of.

In the absence of notice against trespass, no action will lie for taking fish from a small lake nearly surrounded by the plaintiff's land.

Crittenden v. Schermerhorn.

TRESPASS for fishing in plaintiff's lake. The plaintiff had judgment below.

Hugh McCurdy, for plaintiff in error.

Gould & Lyon, for defendant in error. The owner of the land beneath inland waters has the exclusive right of fishery in the water (*Hudson v. MacRae*, 4 B. & S. 584; *Hargreaves v. Diddams*, 10 Q. B. 582; 14 Eng. 382; *Com. v. Chapin*, 5 Pick. 199; 16 Am. Dec. 386; *Waters v. Lilley*, 4 Pick. 145; 16 Am. Dec. 333); and one who goes upon the water for the purpose of fishing commits a trespass even if no fish are caught. Woolrych's Law of Waters, 123, 231-2; 2 Waterman on Trespass, 275; *Holford v. Bailey*, 13 Jur. 278; 18 L. J., Q. B. 109, 13 Q. B. 642.

PER CURIAM. The small lake or pond on which the alleged trespass was committed was almost entirely inclosed within the lines of plaintiff's farm. Whatever question might arise respecting the right to exclusive fisheries in larger bodies of water, the right of the land-owner to the exclusive control of small bodies thus situated would seem clear.

It has always been customary, however, to permit the public to take fish in all the small lakes and ponds of the State, and in the absence of any notification to the contrary, we think any one may understand that he is licensed to do so. No such notification appears in this case, and we therefore hold that the defendant was not a trespasser in passing upon plaintiff's land with the intent to take fish, having no knowledge that objection existed to his doing so.

Judgment reversed with costs of this court.

Judgment affirmed.

CRITTENDEN V. SCHERMERHORN.

(89 Mich. 661.)

Marriage — divorce — alimony — husband not liable beyond.

Where alimony in a wife's suit for divorce has been fixed by the court and duly paid by the husband, the husband is not liable for subsequently furnished necessities.

Crittenden v. Schermerhorn.

APPEAL from probate commissioners. The opinion states the case. The plaintiff had judgment below.

Joslin & Whitman, for plaintiff in error.

Norris & Uhl, for defendant in error. A husband is liable for necessities supplied to his wife when living apart from him because of his misconduct, or by mutual agreement, if his allowance to her is inadequate (*Lockwood v. Thomas*, 12 Johns. 248; *Evans v. Fisher*, 10 Ill. 569; *Ross v. Ross*, 69 id. 569; *Bevier v. Galloway*, 71 id. 517; 2 Bright's Husb. and Wife, 19; Story on Cont., § 97; *Hodgkinson v. Fletcher*, 4 Campb. 70); the facts which support divorce *a mensa et thoro* justify a wife in leaving her husband with a credit for necessities (*Hancock v. Merrick*, 10 Cush. 41); the husband's liability for necessities is not determined by his requesting his wife to return. 2 Bright's Husb. and Wife, 11.

CAMPBELL, C. J. Defendant in error, Mrs. Schermerhorn, presented a claim against her father's estate for services in taking care of her mother. Mrs. Basom, the mother, left her husband's home in March, 1868, and in April, 1868, went to housekeeping, her daughter, Mrs. Schermerhorn, going with her and continuing with her until her death in November, 1871. Frederick Basom, the husband, died in the spring of 1873. At the time of the separation he owned a farm in the township of York, Washtenaw county.

The evidence tends to show that Mrs. Basom was justified in leaving her home, and there is some testimony of serious causes of grievance. Immediately after leaving her husband, on the 10th of March, 1868, she filed a bill to obtain a divorce, which, although the record is not explicit, seems to have been based on a claim of cruelty. The parties were both over 80 years old. On the 7th of April, 1868, an order for alimony was made, based on affidavits of Mrs. Schermerhorn and Dr. Watson averring that complainant was and had been for ten years sick and needing constant nursing, watching and care, subject to sinking turns in which she was helpless for days at a time, and not in condition to be left alone.

This alimony was all paid up from time to time, though not with absolute promptness.

The account of Mrs. Schermerhorn is for her services in her

mother's behalf, rendered, as she testifies, at her mother's request, with her mother's assurance of payment. She testifies she never presented an account to her father, nor to any one before she filed it with the commissioners on his estate. There is testimony tending to show the services were such as would come within the legal definition of necessities. And there was also testimony which would authorize a jury to find there was ground of recovery, if there had been no alimony granted in the divorce suit.

The divorce suit was brought seasonably to an issue by replication on the 29th of April, 1868. An allowance was made beyond alimony for the expense of testimony. Time was extended till November 25, 1868, for taking testimony, but it does not appear that complainant took any, and the case was never brought to a hearing. No application was ever made for further alimony.

In the absence of any express promise, the power of a wife separated from her husband without her fault rests on an implied authority to bind him for necessities, when he has made no sufficient provision for her support. If he makes sufficient provision, or if he makes provision to an amount she assents to receive without coercion, he is not bound to make good her contracts for necessities. This is not questioned. *Hodgkinson v. Fletcher*, 4 Campb. 70; *Reeve v. Marquis of Conyngham*, 2 Car. & K. 444; *Holder v. Cope*, id. 437; *Mizen v. Pick*, 3 M. & W. 411; *Emett v. Norton*, 8 C. & P. 506; *Dixon v. Hurrell*, id. 717; *Turner v. Winter*, 1 Selw. N. P. 295; *Ozard v. Darnford*, id.

The principal question presented here is how far the husband is liable when alimony is fixed by a competent court in a suit for divorce brought by the wife. No question can properly arise here upon a failure to pay what has been decreed, because there has been no substantial default, and no services rendered or contracted for by reason of the lack of means caused by default.

In *Manby v. Scott*, 1 Sid. 109 (reported in English in 2 Smith's Leading Cases, 408), it was held that a wife separated from her husband by his fault was bound in all cases to apply for alimony to the proper court, and that her husband was not liable for necessities. The more recent authorities, recognizing the want of power in the spiritual courts to enforce their decrees by adequate process, have qualified this doctrine by holding the husband exempt if he complies with the order of alimony, but liable for any necessities which his non-compliance may have made it requisite to obtain on credit.

This question came up in *Hunt v. DeBlaquiere*, 5 Bing. 550, where a husband against whom alimony had been ordered, left the realm and had paid only about two years' allowance in seven years and more. The necessaries furnished were less than the arrears, and he was held liable. The court criticise and distinguish *Manby v. Scott*, and refer to the insufficiency of any proceedings to enforce alimony under such circumstances, and draw the line clearly between the rules applicable to alimony paid and unpaid.

In *Houlston v. Smyth*, 3 Bing. 127, alimony had not been decreed until after the goods were furnished, and was therefore held to be no defense. And in *Keegan v. Smith*, 5 B. & C. 375, the same defense was overruled, although the alimony had been made to date back, because when the credit was furnished, it had not been ordered, and a lawful credit could not be destroyed by matter *ex post facto*.

In *Willson v. Smyth*, 1 B. & Ad. 801, the question was plainly settled. There alimony had been decreed in the Consistory Court, and the husband appealed to the Arches Court from the decree. The appeal superseded the decree, and no new alimony was ordered by the Court of Arches, but the husband kept on paying it, and it appeared the latter court would have ordered it without any new showing if it had been applied for. Under these circumstances the lord chief justice held that the husband was discharged, and nonsuited the plaintiff, and a rule to set it aside was refused by the court in bank.

The testimony of the claimant is quite positive that from the beginning of the services they have been constant, and that from the very outset all of her time was devoted to her mother without any considerable addition of labor or responsibility. The showing made on obtaining alimony was to the effect that she was practically entirely helpless. There was no time during the pendency of the divorce suit when an application for a further allowance would not have been competent if any grounds existed for it. The account presented makes no claim for increase during that period, and the alimony was obtained on claimant's showing.

It would certainly be a strange practice to allow a jury in a collateral proceeding to review the action of a court of chancery on a question of fact submitted to it for adjudication. It must be taken for granted that the alimony allowed was the proper amount to be allowed, and that the Circuit Court would at any time have in-

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creased it if any reason existed for the increase. The long delay in failing to bring the suit to hearing indicates acquiescence in the condition of things already existing, and the authorities all agree that no creditor can be put in any better position to complain of the husband than the wife herself. It is only in her right that any suit at all can be upheld.

We think the court improperly left it to the jury to consider the sufficiency of the alimony.

The other points do not seem to be very important, as it is not probable the jury found any agreement. There is no evidence that so far as the record shows indicates it, and we must assume their finding was based on the insufficiency of the alimony.

We have made no reference to the very unsatisfactory shape of the record, inasmuch as no attempt was made seasonably to dismiss or to obtain a further return, and it must be assumed the parties were satisfied with it as made.

Judgment must be reversed with costs and a new trial granted.

Judgment reversed.

The other justices concurred.

RUSSEL V. PEOPLE'S SAVINGS BANK.

(89 Mich. 671.)

Marriage — married woman's liability on indorsement for corporation debt.

A married woman is not liable on her indorsement of a note transferred by her to secure the debt of a corporation in which she is a stockholder.

ACTION on note. The opinion states the facts. The plaintiff had judgment below.

Henry Russel and Chas. A. Kent, for plaintiff in error.

C. J. O'Flynn, for defendant in error. A married woman has the same power in regard to her individual property that she would have if unmarried (Uomp. Laws, § 4803), and an unmarried woman can make any contract with regard to her property that a man

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could make with respect to his own property. Comp. Laws, § 4204; *Glover v. Alcott*, 11 Mich. 489.

COOLEY, J. The suit against Mrs. Russel in the court below was upon a contract of indorsement. It appears that the Detroit Car Works, a corporation in which she was a stockholder, was indebted to the Savings Bank upon a note which was about to be sued, and that to prevent suit she indorsed over to the bank a note held by herself against the Hamtramck Iron Works. This last note does not appear to have been received in exchange for the other, though the note against the Car Works was surrendered; but it was held by the bank as collateral security, and as it exceeded the other note in amount, there would have been a balance to return to Mrs. Russel had it been paid. No payment being made upon it, this suit was brought.

When the indorsement was made Mrs. Russel was and now is a married woman. Under the statute (Comp. Laws, § 4803) she was empowered to contract, sell, transfer, mortgage, convey, devise and bequeath her own property and in the same manner and with the like effect as if she were unmarried. Therefore, no question can arise respecting her right to transfer the note to the bank by indorsement. Nor, had the transfer been made for any purpose of her own, could her liability on the indorsement have been questioned. She might have purchased property with it, and thus pledged her personal responsibility (*Tillman v. Shackleton*, 15 Mich. 447; *Campbell v. White*, 22 id. 178); but affirmative proof that the contract concerned her own estate would have been essential. *Powers v. Russell*, 26 id. 179; *Emery v. Lord*, id. 431.

But a contract of suretyship is not one by which the woman contracts, sells, transfers, mortgages or conveys her own property or any part of it. She sells nothing by it, buys nothing by it, gives a lien upon nothing by it. She pledges merely her personal responsibility, having in view only the benefit of another, and not any advantage to her own estate. Such a contract is therefore not within the words of the statute. Neither is it within the spirit of the statute, for that had in view the relieving of the wife from disabilities which operated unfairly and oppressively, and which hampered her in the control and disposition of her property for the benefit of herself and her family. It was not its purpose to give her a general power to render herself personally responsible

upon engagements for any and every consideration which would support a promise at the common law. This has been so fully explained heretofore that nothing further need be said concerning it. *De Vries v. Conklin*, 22 Mich. 255; *West v. Laraway*, 28 id. 464.

But it is said that in this case the suretyship was for the benefit of a corporation in which Mrs. Russel was a stockholder, and therefore she must be supposed to have had in view in making it her own interest in the corporation. Mrs. Russel, however, was not identified with the corporation otherwise than as having an interest in it; the legal identity of each was distinct, and contracts for the benefit of the corporate estate were in no sense contracts for the benefit of the estate of one of its corporators. *Talbot v. Scripps*, 31 Mich. 268. It is true that if it resulted advantageously, it might eventually bring incidental benefit to the stockholders, but on the other hand it might also bring incidental injury; and whether beneficial or injurious, the result would have been indirect and circuitous, following not directly a contract made on her own behalf, but remotely a contract made on behalf of another.

It is not enough that such possible indirect benefits are looked for, in a contract of suretyship, for these may be in view in many cases, and especially when the wife becomes surety for the husband. The test of competency to make the contract is to be found in this: that it does or does not deal with the woman's individual estate; possible incidental benefits cannot support it. Tested by this criterion this contract of indorsement, so far as it involves a personal responsibility, must fail. Mrs. Russel has contracted for the advantage, not of her own estate, but of a corporation with which she is no more identified in law than she is with her husband or any third person. Even if presumptive incidental benefit could support her contract, it could not be supported under these circumstances, for by pledging her own responsibility for the corporate debt she would only put a large share of her estate at risk in the corporate business, and if any presumption could arise from this, it would be that it was prejudicial rather than advantageous. But there is no occasion to indulge in presumptions one way or the other; it is sufficient that the contract is one of suretyship merely, and as such is not one the statute empowers a married woman to make.

Bosman v. Akeley.

The judgment must be reversed with costs, and a new trial ordered.

Judgment accordingly.

CAMPBELL, C. J., and GRAVES, J., concurred. MARSTON, J., did not sit in this case.

BOSMAN V. AKELEY.

(39 Mich. 710.)

Guaranty — of collection — when enforceable.

A guaranty of collection cannot be enforced until legal proceedings to collect have been instituted and proved ineffectual, although the principal may have been insolvent.

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

John C. Fitzgerald, for plaintiff in error. If the principal is insolvent when the note falls due, and continues so, suit may be brought at once on the guaranty of collection without first attempting to collect of the maker by suit (2 Dan. Neg. Inst. 649; 2 Pars. Notes and Bills, 142-3; *Camden v. Doremus*, 3 How. 533; *Ward v. Fryer's Ex'rs*, 19 Wend. 494; *Aldrich v. Chubb*, 35 Mich. 360); where there are issues of law and fact, judgment cannot be entered until both are disposed of. *Belknap v. McIntyre*, 2 Abb. Pr. 366; *Masters v. Barnard*, 6 How. Pr. 113.

Akeley & Farr, for defendant in error.

COOLEY, J. [Omitting an unimportant point.] There still remains on the record the question of law whether the court was right in sustaining the demurrer. The suit was brought on the guaranty by defendant of the collection of a note made by one Keeler. The form of the guaranty is not given, but the allegation in the declaration is, that the defendant "for a valuable consideration to him in hand paid, by a guaranty in writing indorsed upon said note and signed by said defendant, did guarantee to said plaintiff the collection of said note." It is then averred that at the time

the note became due and payable the said Keeler was and ever since has been "pecuniarily irresponsible and insolvent," by reason whereof the said note at the time when the same became due and payable was and ever since has been and now is uncollectible; "and that the same was duly presented for payment and payment refused." The question presented on demurrer to these allegations is, whether the fact that the maker of the note was pecuniarily irresponsible and insolvent excuses the neglect to take proceedings at law for collection; or to state it in other words, whether the terms of the guaranty do not require proceedings at law to enforce the collection of the note as a condition precedent to a resort to the guarantor.

The cases on this subject are greatly at variance. In *M'Doal v. Yeomans*, 8 Watts, 361, it was held that on a guaranty that a note is "collectible" it is not necessary for the guarantee to attempt collection by legal proceedings if the maker is insolvent. See also *McClurg v. Fryer*, 15 Penn. St. 293. This has always been the doctrine of the courts in Massachusetts. *Sanford v. Allen*, 1 Cush. 473, explaining *Marsh v. Day*, 18 Pick. 321. See *Miles v. Linnell*, 97 Mass. 298. And as to Maine, see *Gillighan v. Boardman*, 29 Me. 79. In *Wheeler v. Lewis*, 11 Vt. 265, it is said that where a note is warranted "good and collectible" the holder is bound to resort to legal measures within a reasonable time, and to pursue them with common diligence, or show what is equivalent, the absolute insolvency of the maker of the note. To the same effect are *Bull v. Bliss*, 30 Vt. 127; *Dana v. Conant*, id. 246. And see *Thompson v. Armstrong*, 1 Ill. 48; *Stone v. Rockefeller*, 29 Ohio St. 625. Cases in Connecticut sometimes cited as supporting these have no bearing, as they rest on peculiarities in the local law of indorsement. *Perkins v. Catlin*, 11 Conn. 213; *Ransom v. Sherwood*, 26 id. 437.

The New York cases, on the other hand, have always held that in fixing liability on such a guaranty, the only evidence that the note is not collectible is the failure of legal proceedings diligently pursued to result in collection. *Moakley v. Riggs*, 19 Johns. 69; *Thomas v. Woods*, 4 Cow. 173; *Taylor v. Bullen*, 6 id. 624; *Morris v. Wadsworth*, 11 Wend. 100; *White v. Case*, 13 id. 543; *Curtis v. Smallman*, 14 id. 231; *Loveland v. Shepard*, 2 Hill, 139; *Craig v. Parkis*, 40 N. Y. 181. In Wisconsin the rule is the same. *Day v. Elmore*, 4 Wis. 190; *Borden v. Gilbert*, 13 id. 670; *Dyer v. Gib-*

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son, 16 id. 557 ; *French v. Marsh*, 29 id. 649. The like rule seems to be recognized in Kentucky, *Ely v. Bibb*, 4 J. J. Marsh. 71 ; and in Texas, *Shepard v. Phears*, 35 Tex. 763. See also *Peck v. Frink*, 10 Iowa, 193.

The point has never been directly passed upon in this court, but in *Dwight v. Williams*, 4 McLean, 581, the Circuit Court of the United States for this Circuit approved and applied the New York rule. We believe that rule to be reasonable, and to accord with the general understanding of parties when such guaranties are given. The undertaking that a note is collectible means that if proceedings for collection are diligently prosecuted at law they shall result in collection. It does not mean that the maker of the note is responsible, or shall remain responsible, but that the debt shall be collected if the proper steps are promptly taken for the purpose. It may be that an officer would find attachable property, where the witnesses know of none ; it may be that with the large exemptions allowed by law the debtor would choose to make payment, rather than have the judgment stand against him, even when payment could not be enforced.

It follows that the Circuit judge did not err in sustaining the demurrer.

The other justices concurred.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

CURBYER V. MERRILL.

(25 Minn. 1.)

Constitutional law — act to provide uniform text-books for public schools.

An act of the legislature providing that certain State officers shall contract on behalf of the State, with a designated individual, for furnishing the State for fifteen years with suitable text-books for the use of the public schools of the State, within specified maximum prices, of a certain size and quality and to be approved by a designated commission, is constitutional.

ACTION to enjoin the execution of a contract. The legislature had enacted that certain designated State officers should contract on behalf of the State with Daniel D. Merrill of St. Paul, for furnishing to the State, for the period of fifteen years, suitable text-books for use in the public schools of the State, to be supplied within maximum prices fixed by the act, to be equal in size and quality to certain designated books, and to be approved by a commission appointed by the act, the books thus furnished to be used in all the public schools of the State, with certain exceptions. The plaintiff alleged that he was a resident of a certain school-district, and the father of children entitled to attend and attending the common school of that district, that his children were supplied with

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the text-books already in use in the public schools in the State, and which would be superseded by the text-books to be furnished under the contract; that he would be obliged to purchase the new series of books, without the benefit of a competitive market, and at a higher price than that at which he could buy the standards named in the act; and that the loss of the books now in use, and the purchase of the new ones, would damage him in the amount of eight dollars and more, and would damage the parents of children attending the public schools in the amount of \$300,000 and more, and would seriously impede his and their children in obtaining the benefits of a free school education, and would preclude many children from the common schools altogether; that he was a dealer in the books then in use, and had on hand, for sale, a stock of such books of the value of \$150 and upward, and that the value of such text-books owned and held for sale in the State was upward of \$400,000 and the use and value of those would be destroyed if the contract sought to be prevented shall be made and the new text-books, to be furnished thereunder, should be introduced.

The defendant interposed a demurrer, which was sustained, and the plaintiff appealed.

Charles N. Bell, for appellant.

Williams & Davidson and *Gilman, Clough & Lane*, for respondent.

CORNELL, J. With the wisdom or policy of the statute under consideration courts have rightfully no concern. The remedy for injudicious legislation rests with the legislature where, it is supposed, it may be more safely left than with the courts, mainly because of the corrective influence which the people constantly exercise through frequent elections over that department of their government. To the judiciary belongs the more restricted duty of passing upon the validity of legislative enactments, as being within or without the boundaries assigned to the law-making power by constitutional law. The sole inquiry, therefore, in this, as in every other case of this character, respects the extent of legislative authority, under the Federal and State Constitutions, over the subject-matter of the statute which is impugned because of its alleged invalidity. In the prosecution of this inquiry it must always be remembered that under the American systems of government, the

people are recognized as possessing in their primary organized capacity the absolute and complete power of legislation as fully and to the same extent as belongs to every uncontrolled sovereignty ; that in the organization of the Federal and State systems of government, they have conferred upon the former, by the Constitution of the United States, exclusive legislative power in respect to certain matters, and prohibited its exercise in respect to others, and that save as thus conferred or forbidden, they have in this State intrusted with the legislative department which they have created the whole power of making laws which they originally possessed, subject only to such restrictions and limitations upon its exercise as they have prescribed in the State Constitution. Plenary legislative power is therefore the rule, while want of it is the exception. As a sequence it logically follows that every statute duly passed by the State legislature is presumably valid, and this presumption is conclusive unless it affirmatively appears to be in conflict with some provision of the Federal or State Constitution ; and in order to justify a court in pronouncing it invalid, because of its violation of some clause of the State Constitution, its repugnancy therewith must be so "clear, plain and palpable," as to leave no reasonable doubt or hesitation upon the judicial mind. *Ames v. Lake Sup. & Mias. R. Co.*, 21 Minn. 282 ; *Fletcher v. Peck*, 6 Cr. 87 ; *People v. Draper*, 15 N. Y. 543 ; *Cooley's Const. Lim.* 67, 164, 175 ; *Sharpless v. Philadelphia*, 21 Penn. St. 147.

Conceding, therefore, to the fullest extent, the contention of plaintiff, that the powers assumed by the State under the provisions of the statute in question, in prescribing what kind of text-books shall be exclusively used in the public schools, in directing how, by whom, and on what terms they shall be purchased, distributed and sold, and in giving to one individual, for a definite period of time, the exclusive contract and monopoly of furnishing the same, work a radical change in the administration of our common-school system, by withdrawing from all local supervision and control matters which have hitherto been regarded as most wisely left to the district authorities and the patrons of these institutions, and that such change is vicious in principle, unwise in policy, and utterly subversive of those principles of local self-government which have heretofore pervaded the system ; still the change is one which the courts are powerless to prevent, however great or certain the apprehended evils, unless it can be clearly demonstrated that the legisla-

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ture, in its enactment, has exercised some forbidden power, and violated some specific provision of paramount law. That the proper education of all its citizens vitally concerns the permanent prosperity and public welfare of the State is not controverted. Whatever provision therefore may be necessary to the attainment of this end, it is clearly within the jurisdiction of the legislature, as the representative of the sovereign law-making power of the State, to make, subject only to such restrictions as are imposed upon the exercise of the power by the fundamental law.

The whole question, also, of the necessity or expediency of any particular measure, with reference to this matter, is one of legislative and not judicial cognizance. In the absence of any constitutional prohibition, the whole matter of the establishment of public schools; the course of instruction to be pursued therein; how they shall be supported; upon what terms and conditions people shall be permitted to participate in the benefits they afford — in fine, all matters pertaining to their government and administration — come clearly within the range of proper legislative authority.

This brings us to the question, which is really the sole one in this case, whether the present measure in any way conflicts with any constitutional provision inhibiting or limiting legislative power upon this subject. The only clause in the State Constitution upon which any objection to the statute before us is, or can be, rested with any show of reason, is found in section 1, article 8, which is as follows: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools. It is contended that the last clause of this section compels uniformity of text-books in all public schools established under legislative authority, and that the present statute is in violation of this requirement, inasmuch as it specially exempts from the operation of its provisions all special school-districts, created under special laws. The claim is that the same rules which the legislature directs shall be applied to the ordinary common schools and school-districts, in respect to the use and procurement of text-books, must also be extended to all independent and special school-districts. The rule of uniformity contemplated by this constitutional provision which the legislature is required to observe, has reference to the system which it may provide, and not to the district organizations that may be established under it. These may

differ in respect to size, grade, corporate powers and franchises, as may seem to the legislature best, under different circumstances and conditions; but the principle of uniformity is not violated, if the system which is adopted is made to have a general and uniform application to the entire State, so that the same grade or class of public schools may be enjoyed by all localities similarly situated, and having the requisite conditions for that particular class or grade. Hence, the establishment, under our general laws, of common school-districts and independent school-districts — two distinct classes of organization in respect to size, population, grade and corporate powers, though alike in most of their functions, in their public character, and in affording upon like terms the means for obtaining a common-school education to all resident scholars of the requisite age — is not in violation of the constitutional provision now under consideration.

Irrespective, however, of these considerations, it is certain that the imposition of a duty is not a limitation of power. The direction to establish a general and uniform system of public schools neither prohibits nor restrains the legislature from providing other public schools, in addition to those included in the general system, or from creating, as it has in several instances, by way of exception to the general uniformity, special school-districts, to meet particular and exceptional cases. The right to create and establish different classes and grades of public schools and school-districts necessarily involves the right to prescribe, for each, separate and distinct regulations, specially adapted thereto, and not applicable to the others. For these reasons, the enactment in question is not invalid because its provisions are confined in their operation to the ordinary common school-districts of the State.

It is insisted by plaintiff that the enforcement of the statute will practically result in limiting the sales of other books of like character, such as have heretofore been in use in the public schools, thereby depreciating their market value to plaintiff's injury, as one of the interested owners of such books, and that it will deprive the patrons of the schools of the benefits of an open and competitive market in which to make their purchases, and thus directly impose upon them an additional burden, as a necessary condition to the enjoyment of any of the advantages of these institutions. All this may be so, and still the statute is not therefore invalid, because it invades no legal rights of plaintiff, and violates

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no provision either of the State or Federal Constitution. As already stated, the course of instruction to be pursued in these schools is entirely under legislative control, save as restricted by the provisions of the State Constitution. The objection therefore that the present measure will involve the imposition of additional burdens upon the patrons of the schools, as it does not rest upon any prohibition of the Constitution, raises a question of legislative discretion and policy only, and not one of power.

The right of property which may belong to the plaintiff in respect to any books is in no way legally disturbed by any provisions of this enactment. An exclusion directed against the use of any particular class of books in the public schools, or a refusal of the State to purchase them, is in no legal sense a restriction upon the right of the owner to sell, or any interference with his right of property therein.

The cost of the prescribed text-books to those who may become purchasers for the use of their children is in no just or legal sense a tax. Such of the objections of plaintiff as rest upon the opposite proposition are therefore untenable.

The statute is not a revenue act within the meaning of section 10, article 4, of the Constitution. A bill for raising a revenue is one whose main purpose is to raise money by taxation. A mere appropriation of public money, though it may lead to the necessity of taxation, is insufficient to characterize a measure as one for revenue, such as must originate in the house, and not in the senate. 2 Story on Const. (4th ed.), § 880.

[Omitting minor points.]

This covers all questions which we deem it of any importance to discuss.

Order affirmed.

STATE V. ANDERSON

(35 Minn. 66.)

Criminal law — larceny — of change for bill.

A. offered a \$5 bill to pay 40 cents ferriage, received and kept the \$4.60 in change, but refused to deliver the \$5 bill. *Held*, larceny. (*See note*, p. 458.)

CONVICTION of larceny, of \$4.60. The opinion states the facts.

Henry Hinds, for appellant.

Geo. P. Wilson, attorney-general, for the State.

CORNELL, J. [Omitting other points.] The facts testified to in connection with the alleged larceny, briefly stated, are these: The accused, being in a buggy, and in a hurry to cross the Minnesota river, applied to one Baldwin, the complaining witness herein, who was operating a ferry, to cross him over as quickly as possible, in order to enable him to reach a train on the Minneapolis and St. Louis railroad. While being ferried hurriedly over, but before reaching the opposite shore, he asked Baldwin, on being told the amount of the fee or charge, if he could change a five-dollar bill. The latter at once took out his wallet, stepped between the wheels, and, as the wind was blowing at the time, proceeded to count out the required amount, in change, over and above the ferryage fee, placing it in the bottom of the buggy, in front of defendant, who was on the seat. About this time, the boat struck the shore, and the ferryman stepped back and seized the rope, in order to hold the boat, leaving the money in the buggy. Thereupon, the accused, without delivering over the five-dollar bill, immediately drove off, and took with him the money so counted out for change. There was also further testimony in regard to his subsequent conduct, bearing upon the question of felonious intent.

Upon this state of facts it is claimed by defendant that the possession of the money, which is the property alleged to have been stolen, was voluntarily surrendered to him by Baldwin, the owner and that the court, therefore, erred in not giving to the jury the following requests, asked by him, without any qualifications, viz.: (1) that to make the carrying away stealing, the first taking must have been a trespass; (2) that to be stealing, the original intent in taking the property in question must have been felonious." Considered in connection with the testimony, these requests, without explanation, were clearly objectionable, as liable to mislead the jury. They were calculated to create the impression that the "carrying away," and the "first taking," therein mentioned, referred to two wholly separate and disconnected acts, and that proof of some tortious and felonious act of taking, distinct and prior to that of

carrying away the money charged to have been stolen, was necessary to sustain a conviction. As an inference, the jury might very naturally suppose they ought to acquit, unless they were able to find the existence of the *animus furandi*, at the precise moment when the defendant first obtained qualified possession of the property, by its being placed and left in his buggy by Baldwin, for the special purpose, and under the circumstances indicated in the evidence, or in case they should find that that possession was not in itself tortious and unlawful, because no purpose had then been conceived to hold it contrary to the wishes and intention of the owner. It is plain that a conclusion reached under the influence of such views would be the result of a total misapprehension of the legal principles properly applicable to the facts which the evidence in the case tended to establish. Such evidence was sufficient to justify the jury in finding, as conclusions of fact, that the defendant offered to pay Baldwin the ferriage which was his due, out of a five-dollar bill, if the latter would make the requisite change; that Baldwin, assenting thereto, thereupon counted out the required sum, and placed it in the defendant's buggy and control, for the sole purpose of complying with the terms of the offer on his part, and thus getting his pay; that the defendant, instead of carrying out his part of the offer, by delivering over the five-dollar note, as contemplated, immediately drove off with the money which he had thus obtained of Baldwin, against his protest, and with the felonious intent of stealing it. All these acts were inseparable parts of one continuous transaction. It is immaterial at what precise moment of time, during the transaction, the felonious intention was first formed of taking and holding the money against the consent of the owner; whenever it was formed and executed, *animo furandi*, by carrying it off, that moment he became a trespasser, and was guilty of larceny. That he may have had no wrongful intent, in fact, at the precise point of time when he first received the money into his buggy from Baldwin, was not a controlling circumstance in determining the question of his guilt or innocence of the offense charged; for the delivery to him of the property, under the circumstances, was only a conditional one, out of which no legal possession nor right of possession, against the owner, could spring, except upon performance of the condition. His retention of the money without such performance, and against the consent of the owner, was wrongful, and made him a trespasser; and if this was

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also done with a felonious intent of stealing, he became criminally liable.

Taken as a whole, the charge, as given, was substantially in accordance with these views, and there is no error upon which a new trial ought to be awarded.

Judgment and sentence affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—The converse of this case, namely, the larceny of money handed over to be changed, has several times arisen. Of a very recent case of this sort the London *Law Journal* says: "Some comment has been made by our lay contemporaries on a decision arrived at last week by the deputy stipendiary magistrate at Cardiff. The 'under boots' at a hotel was charged with stealing £25 from a commercial traveller. A £25 note was given by the prosecutor to the defendant to change. Instead of bringing back the change, the defendant disappeared and spent the money. He could not be convicted of larceny at common law in respect of the note, because he received it with the full consent of the prosecutor. He could not be convicted of larceny as a bailee, because there was no bailment, the prosecutor never intending to get back the note. He could not be convicted of embezzling the change, because he was not a clerk or servant of the prosecutor. This, we believe, exhausts the possible criminality of the man; and therefore, criticisms should be directed not to the decision but to the law, which has long been known to provide no punishment for this class of fraud." In *Hildebrand v. People*, 56 N. Y. 394; s. c., 15 Am. Rep. 435, the prosecutor handed to a bar-tender a \$50 bill to take out ten cents in payment for a glass of soda. The bar-tender put down a few cents on the counter and refused to deliver any more money. *Held*, larceny. The court distinguishes *Reg. v. Thomas*, 9 C. & P. 741, where the prosecutor gave the prisoner a sovereign to go out and get it changed. The New York case is supported by *Reg. v. McKale*, 11 Cox's C. C. 82.

KEAN V. CONNELLY.

(35 Minn. 222.)

Tenants in common — liability of one to respond to other for produce of property.

In the absence of an agreement, or the exclusion by one of the other from the land, one co-tenant cannot recover of another the avails of the crops raised on the common property, which he has appropriated to his own use, although the statute permits the recovery of his proportion of the "rents and profits."

ACTION to recover one-third of the value of certain grass. The opinion states the case. The plaintiff had judgment below.

Davis, O'Brien & Wilson, for appellant.

Smith & Hale, for respondent.

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BERRY, J. Defendant and the plaintiff's intestate were tenants in common of certain parcels of land, the former owning an undivided two-thirds, the latter the remainder. Defendant cut grass growing upon the land. This action is brought to recover one-third of the value of the same, "as rents and profits" of the common property, received by defendant. It is not alleged or shown that defendant sold any of the grass; but the complaint alleges that the grass was cut and taken by him, and that he "converted" it to his own use. As these allegations are not controverted, it may be assumed that the defendant in some way appropriated the grass to his own use, and thus had the benefit of it, though it cannot be assumed that he sold it, or that he received value for it in money or otherwise. The answer denies that the value of the rents and profits was as large as alleged in the complaint, and attempts to set up a counter-claim, arising out of the payment, by defendant, of all the taxes charged upon the whole of the common land. No facts are averred showing that any accounting is necessary, in order to determine what share of the rents and profits received by defendant the plaintiff is entitled to recover. But upon the issues as found, if he is entitled to recover any thing, he is entitled to recover a share of such rents and profits proportionate to his share in the lands, to wit, one-third, less the deduction, if any, to which the defendant may be entitled, on account of the payment of taxes. In other words, it is, upon the issues, to be assumed that the defendant is not entitled to have the plaintiff's one-third of the rents and profits, received by defendant, abated or reduced, on any other account than that of such payment of taxes. Under this state of facts, there is no reason why, if the plaintiff is entitled to recover at all, he should not do so in this action, which may properly be regarded as in the nature of *assumpsit*. Freeman on Co-tenancy, §§ 280-284.

The main question of the case is, whether one tenant in common can recover any thing of his cotenant for taking and controverting to his own use the products of the common land? The question has, of course, no reference to a case of waste, or the receipt of rents or profits from a third person. Our statute enacts that "one joint tenant or tenant in common, and his executors or administrators, may maintain an action against his co-tenant for receiving more than his just proportion of the rents or profits of the estate owned by them as joint tenants or tenants in common." Gen. St., ch.

75, § 24. As respects the ground of the liability of one tenant in common to his co-tenant, this statute is analogous to 4 and 5 Anne, ch. 16, which gives an action of account by one tenant in common against another as his bailiff, "for receiving more than comes to his just share or proportion;" also, to the statute of New York, which gives a like action against a co-tenant "for receiving more than his full proportion." (1 R. S. 750, § 9); also to the statute of Indiana, which gives a tenant in common an action against his co-tenant, "for receiving more than his just proportion." The statute of Missouri is similar to the New York statute.

In *Henderson v. Eason*, 17 Q. B. 701, on appeal from the court of Queen's Bench to the Exchequer Chamber, the passage above quoted from the statute of 4 and 5 Anne was fully considered, and was held "to apply only to the cases where the tenant in common receives money or something else, where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share according to that proportion." *McMahon v. Burchell*, 2 Phil. 134, (22 Eng. Ch. 125,) is to the same effect. In *Woolever v. Knapp*, 18 Barb. 265, the statute of New York came under consideration. It was held to be substantially the same as the statute of Anne, and the court followed *Henderson v. Eason*, *supra*, holding that one of the several tenants in common, who possesses the entire premises, without any agreement with the others as to his possession, or any demand on their part to be allowed to enjoy the premises with him, is not liable to account to his co-tenants for the use and occupation of the premises. This case is approved and followed in *Dresser v. Dresser*, 40 Barb. 300; in *Elwell v. Burnside*, 44 id. 447; *Wilcox v. Wilcox*, 48 id. 327; in *Scott v. Guernsey*, 60 id. 163, and has not, so far as we discover, been criticised or disapproved in any of the courts of New York. In *Crane v. Waggoner*, 27 Ind. 52, the statute of Indiana above referred to was considered, and citing and following *Henderson v. Eason*, and *Woolever v. Knapp*, the court held, that the statute applied only to cases "where rent and payment in money or in kind, due in respect of the premises, is received from a third party by one co-tenant, who retains for his own use the whole, or more than his proportionate share," and that one tenant in common, unless he has been excluded from possession by his co-tenant, cannot maintain an action against the latter for use and occupa-

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tion. *Ragan v. McCoy*, 29 Mo. 356, is to the same effect. See also *Israel v. Israel*, 30 Md. 120 ; *Izard v. Bodine*, 3 Stockt. 403 ; *Davidson v. Thompson*, 22 N. J. Eq. 83 ; *Pico v. Columbet*, 12 Cal. 414 ; *Peck v. Carpenter*, 7 Gray, 283 ; Freeman on Co-tenancy, §§ 258, 270, 275, 276. A different view of the liability of a tenant in common is taken in *Thompson v. Bostick*, 1 McMullan's Eq. (So. Car.) 75 ; in *Early v. Friend*, 16 Gratt. 47 ; in *Shiels v. Stark*, 14 Ga. 435 ; in *Hayden v. Merrill*, 44 Vt. 348 ; s. c., 8 Am. Rep. 372 ; but we think that Mr. Freeman is warranted in asserting that " the decided preponderance of the authorities, both in England and in America, affirms the right of each co-tenant to enter upon and hold exclusive possession of the common property, and to make such profit as he can by proper cultivation or other usual means of acquiring benefit therefrom, and to retain the whole of such benefits, provided that in having such possession, and in making such profits, he has not been guilty of an ouster of his co-tenant, nor hindered the latter from entering upon the premises and enjoying them as he had a right to do. The reasoning upon which these decisions, constituting the great bulk of the authorities on this subject, rest, is that as each co-tenant has at all times the right to enter upon and enjoy every part of the common estate, this right cannot be impaired by the fact that another of the co-tenants absents himself, or does not choose to claim his right to an equal and common enjoyment ; that it would be inequitable to compel a co-tenant in possession to account for the profits realized out of his skill, labor and business enterprise, when he has no right to call upon his co-tenant to contribute any thing toward the production of these profits, nor to bear his proportion when, through bad years, failure of crops, or other unavoidable misfortunes, the use made of the estate resulted in a loss, instead of a profit, to the one in possession." Freeman on Cotenancy, § 258.

It is not alleged in the complaint in this action that the defendant has been guilty of any ouster of the plaintiff or his intestate, nor that he has in any way hindered them from entering upon the common premises and enjoying the same. Neither does the case disclose any evidence to that effect. If it did, the evidence would be irrevelant, for lack of proper allegations in the complaint. The case is simply one in which the defendant has appropriated directly to his own use products of the common property, without, so far as appears, any exclusion of his co-tenant from the enjoyment

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thereof. In such a state of facts, the plaintiff cannot recover. It is proper to add, that upon the evidence in the case, it does not appear that the defendant has appropriated any more than two-thirds of the grass growing upon the common land. This would be no more than the "just proportion" which the statute under which this action is claimed to be brought allows him, for he owns two-thirds of the land; and in this connection it is further to be noticed, that though evidence as to the quantity of grass cut by defendant was received without objection, the complaint, even if sufficient in other respects, is evidently defective in failing to allege a taking by defendant of more than his "just proportion."

[Omitting the matter of the counterclaim.]

We believe that these conclusions dispose of all the important questions in the case, the result being that the order denying a new trial is reversed.

Judgment reversed.

CITY OF ST. PAUL V. TRAEGER.

(25 Minn. 248.)

Constitutional law — municipal license to sell produce.

A city ordinance prohibiting "every farmer, gardener or person producing vegetables" from selling the same in the streets without first procuring an annual license from the city authorities and paying \$25 therefor, is not warranted by a power "to establish public markets and other public buildings and make rules and regulations for the government of the same, to appoint suitable officers for overseeing and regulating such markets, and to restrain all persons from interrupting or interfering with the due observance of such rules and regulations," and is void as to a farmer living outside the city and raising and selling his own produce.

CONVICTION of selling vegetables without a license. The defendant pleaded not guilty, with a special plea that he was not a resident of the city, but lived more than a mile beyond the city limits; that he was a farmer and gardener, living on and cultivating his own land, raising vegetables, such as are described in the complaint, and selling the same in the city from day to day to fill previous orders. The opinion states other facts.

City of St. Paul v. Traeger.

Smith & Egan, for appellant.

W. P. Murray, for respondent.

CORNELL, J. The ordinance, for a violation of which defendant was convicted, purports to be an amendment of section 2 of an ordinance in relation to markets, and as amended, its provisions are as follows: "Every farmer, gardener or person producing vegetables, shall not sell the said vegetables in, upon or along the public streets or highways in the city of St. Paul, without having first obtained a license so to do from the city clerk, as other licenses are procured, for which license said person or persons aforesaid shall pay into the city treasury the sum of \$25 for one year ending on the first Thursday of May in each year; and no fractional license shall be given; and said license shall only permit the sale of vegetables away from the public market after 10 o'clock of any day."

It is apparent that the provisions of this section are founded upon the assumption that the common council, under the charter, possesses the power to license the pursuit of the particular calling or business mentioned, in and along the streets of the city, and to prescribe, as an incident thereto, when it may be followed, what sum shall be paid for the privilege, and also to prohibit the business entirely without a license, as an efficient means for the protection and enjoyment of the power itself. The ordinance is in entire harmony with this view and no other. It was not passed, as suggested by counsel, by virtue of any power of supervision and control over the streets, because powers of that character are conferred for the sole purpose of putting and preserving the public streets in a fit and serviceable condition, as such, by keeping them in repair and free from all obstructions and uses tending in any way to the hindrance or interruption of the public travel, and to that end alone can they be exercised. The ordinance in question has no such object in view. On the contrary, it expressly authorizes the use of the public streets for the purposes of the licensed traffic during that portion of each day when ordinarily the travel is the greatest, and when such traffic would be most likely to interfere with the free and uninterrupted passage of vehicles and footmen, and it contains no provisions in any way restricting, or calculated to regulate, the manner in which the license business shall be conducted so as to occasion the least public inconvenience. It cannot be

claimed that it was enacted in the exercise of any police power for sanitary purposes, or for the preservation of the good order, peace or quiet of the city, because neither upon its face, nor upon any evidence before us, does it appear that any provision is made for the inspection of any articles sold or offered for sale under the license, or for preventing the sale of any decayed or unwholesome vegetables, nor is there any restraint or regulation whatever imposed upon the conduct of the business during the time it is permitted to be prosecuted. The annual sum exacted for the license is manifestly much in excess of what is necessary or reasonable to cover the expenses incident to its issue. The business itself is of a useful character, neither hurtful nor pernicious, but beneficial to society, and recognized as rightful and legitimate, both at common law and by the general laws of the State. No regulations being prescribed in reference to its prosecution under the license, there could be little, if any, occasion for the exercise of any police authority in supervising the business or enforcing the ordinance, and no cause for any considerable expense on that account. In view of these facts, it is quite obvious that the amount of the license fee was fixed with reference to revenue purposes, which it was the main object of the ordinance to promote by means of a tax imposed upon the particular employment or pursuit, through the exercise of its power over the subject of granting licenses. *Mays v. Cincinnati*, 1 Ohio St. 268.

Such being the nature of the ordinance, and the power asserted in its passage, the question arises, whether, under the provisions of the charter of the city of St. Paul in force at the time of its passage, which provisions are found embodied in the consolidated act of 1874 (Sp. Laws 1874, ch. 1), the common council possessed the particular power which they have thus assumed to exercise.

Under the general rule of construction applicable to municipal charters, the existence of powers of a legislative character must be shown by an express grant, or as incidental and necessary to the proper enjoyment and exercise of such as are expressly conferred. Nothing outside or beyond this can be taken by intendment or implication. *City of St. Paul v. Laidler*, 2 Minn. 159 (190); *Dunham v. Trustees of Rochester*, 5 Cow. 462. And when, as in this case, the ordinance which is sought to be sustained operates in restraint of an occupation or pursuit useful in its character, and which is so recognized at common law and under the laws of the

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State, it is especially necessary to show that the authority for its passage has been expressly or otherwise unequivocally conferred. Dill. on Mun. Corp., § 291 and note.

Furthermore, if as in this case, the charter confers, in general terms, upon the common council authority to pass ordinances for certain designated general purposes connected with the good order and government of the municipality, which is followed by a provision, in the same section containing the grant, declaring in terms that such ordinances, etc., “shall have the force of law, provided they be not repugnant to the Constitution and laws of the United States or of this State,” and that for such purposes, said council “shall have authority by ordinances, resolutions or by-laws,” to do, ordain and enact various enumerated things in the way of municipal control, regulation, restraint, prevention, granting licenses, etc., embracing, as in this instance, forty-one distinct specifications, thereby showing that the legislative mind was fully directed to the different matters concerning which municipal authority was intended to be given, it is but reasonable to conclude that the exact scope and extent of municipal power and authority conferred must be found in these specific enumerations rather than the general grant itself — that the latter is restricted and limited by the former.

Following these general canons of interpretation, there can be but little difficulty in determining the question as to the validity of the ordinance under consideration. Subdivision eighteen, section three of chapter four of the charter (Sp. Laws 1874, ch. 1, p. 33, § 3), under which in particular the power claimed by respondent is asserted, confers authority in terms “to establish public markets and other public buildings, and make rules and regulations for the government of the same; to appoint suitable officers for overseeing and regulating such markets, and to restrain all persons from interrupting or interfering with the due observance of such rules and regulations.” This phraseology is so precise and specific as to leave little if any room for construction to arrive at the meaning and intention of the legislature in making the grant. The statute is its own best expositor. The power “to establish and make rules,” etc., here given, applies both to “public markets” and to “other public buildings.” It is the same in each. The use of the word “other” shows that “markets” was used in a restricted sense, to designate public buildings erected and devoted to the use of receiving, for sale and purchase, such marketable articles for daily use

and consumption as might be wanted to supply the inhabitants of the city. This of course would include the sites for the buildings and grounds adjacent, used for market purposes.

To establish a public market, in this sense, is to designate and provide, by purchase or otherwise, a site or place for the purchase and sale of provisions and articles of daily consumption by all who may desire to repair thither for that purpose, to erect thereon a suitable building adapted to the purpose, and to dedicate the same to such use, for the benefit of the public or the inhabitants of the municipality wherein it is located. The authority which is here given "to make rules and regulations" for such markets or other buildings is not a general and unrestricted one in relation thereto; but it is limited and confined to such as pertain solely to their government, to which end, overseers may be appointed for their enforcement, and "to restrain all persons from interrupting or interfering with the due observance of such rules and regulations." Under such authority, any reasonable system of police regulations may be adopted, providing for the safety and preservation of the property itself, its convenient use and beneficial enjoyment for the purposes for which it is intended, for the maintenance of good order, and in case the building is a market, such further rules as may tend to insure honest dealings between buyer and seller, and guard against fraud and imposition by the use of false weights, the sale of unwholesome food, and such like evil practices. But it would not be allowable, under the color of such a limited authority, for the council to prescribe regulations in respect either to the use of the streets of the city, or the dealings or transactions of any of its citizens or other persons outside and beyond the established local limits of any of its public markets or other public buildings. A license or permission given to a farmer, upon payment of twenty-five dollars into the city treasury, to sell and deliver his vegetable products for a year to a customer living on a street at a distance away from the established public market, cannot, in any just sense, be regarded as a regulation pertaining to the government of such market.

That the power to license, regulate or restrain the particular business aimed at by the ordinance in question is not covered by this subdivision of section three, is made further apparent by reference to the other specifically enumerated powers therein contained. We find there given express authority to license and regulate various

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kinds of business and employments, including "butchers' shops and butchers' stalls, venders of butchers' meat," also power at any time "to revoke any license granted, for malconduct in the course of trade," and "to regulate and restrain the sale of fresh or butchers' meat, within the corporate limits of the city," and "to punish or restrain the forestalling of poultry, game, eggs or fruit, within said city." If the power "to establish public markets" included an authority to license, regulate or prohibit any kind of business away from the locality of the market, it certainly covered that of vending fresh meats, and yet it was deemed necessary to confer it in express terms in that matter, thereby excluding the inference that any such authority could be exercised under the provision in relation to markets. It also appears that although the counsel is expressly authorized to license and regulate various trades and callings and to restrain them if not licensed, there is no provision whatever for licensing hucksters, or the producers and venders of vegetables, or for preventing the sale and delivery of such products without a license elsewhere than at the public markets. This is a significant fact, indicating a legislative intent to withhold all such power. The ordinance cannot, in our judgment, be sustained under the clause relating to the establishment of markets, or any of the provisions of section 3, chapter 4, of the charter. *Dunham v. Trustees of Rochester*, 5 Cow. 462; *Bethune v. Hughes*, 28 Ga. 560; *Caldwell v. Alton*, 33 Ill. 416; *Bloomington v. Wahl*, 46 id. 489; *Barling v. West*, 29 Wis. 307. The question whether and how far, under the charter, the use of the streets of the city may be prohibited to hucksters and others for purposes of traffic, need not be considered, for the ordinance is not one of that character.

Judgment reversed.

BALCH V. WILSON.

(25 Minn. 299.)

National bank — insolvent — set-off as against receiver.

The receiver of an insolvent National bank sued A and B on their joint note given to the bank. They claimed to set off notes given by the bank, and C and D who were also insolvent, as joint makers, to D alone, and maturing after the receiver's appointment, and growing out of a distinct transaction from the note in suit. *Held*, not a proper set-off.

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ACTION by a receiver of a National bank on a note. The opinion states the case. The plaintiff had judgment below.

Wilson & Lawrence, for appellants.

Atwater & Babcock, for respondent.

CORNELL, J. The note sued on was a joint note of the defendants given to the bank, dated on April 18, 1877, and payable one month after its date. The bank was put into the hands of the receiver, under the National Banking Law, on May 29, 1877, which was after the maturity of said note. Giving to the averments of the answer the most favorable construction claimed by defendants, the three several notes set up as a ground for the equitable relief sought, originated in the settlement of a transaction between the defendant Kimball alone and the bank and Tidd & Fales. Said notes were given to Kimball by the bank and Tidd & Fales, as joint makers, being dated April 16, 1877, and payable respectively in twelve, fifteen and eighteen months next thereafter, with interest. Neither of these notes was due at the time the receiver was appointed, nor were they or either of them due when this action was commenced, which appears to have been in November, 1877. It is alleged in the answer that the defendant Kimball transferred, or assigned one-half of these notes to the defendant Wilson, prior to the commencement of this action, but whether before or after the appointment of the receiver is not stated. It cannot be assumed that Wilson acquired any interest in the notes prior to that time, as no such fact is alleged in the pleading. The insolvency of both the bank and Tidd & Fales, the other makers of the notes, is properly alleged. The further fact is alleged, though clearly an immaterial one in this action, that a claim for the amount of these notes has been duly made to the receiver, and disallowed. Upon this state of facts, the defendants ask that the plaintiff be estopped from collecting his demand against the defendants, and that so much of the defendants' demand as may be necessary be set off against that due to the bank in payment of the same, and for other and further relief as may seem just.

The respective rights and liabilities existing between the bank and its creditors and debtors became fixed when its insolvency occurred, and it passed into the hands of the receiver appointed by

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the comptroller of the currency. All the property and assets of the association then became a fund legally dedicated, first, to the satisfaction of any claim of the United States government for any deficiency in the proceeds of the bonds pledged for the redemption of its notes to meet the amount necessary to be expended for that purpose; and second, for a ratable distribution of the balance among its general creditors, upon the principle of equality. No subsequent lien could be created, or right of preference obtained, in respect to any of the assets or property of the bank which did not exist at that time. *National Bank v. Colby*, 21 Wall. 609 (Thompson v. N. B. Cas. 109). The rights of the parties hereto, then, must be determined with reference to the condition of things existing when the receiver herein was appointed; and unless the defendant Kimball, the then holder and owner of the notes against the bank, had at that time the equitable right of set-off here claimed, it is clear that it does not exist in favor of the defendants. *U. S. Trust Co. v. Harris*, 2 Bosw. 76; *Clark v. Brockway*, 3 Keyes, 13; *Matter of Middle District Bank*, 1 Paige, 585; *Clarke v. Hawkins*, 5 R. I. 219.

At that time the joint note of the defendants to the bank was overdue. If it had been paid at maturity according to its terms, the proceeds would have passed into the hands of the receiver as cash assets, subject, without doubt, to be equally and ratably distributed among the general creditors of the association, after settlement of the prior claim of the government according to the provisions of the National Banking Law. Kimball, the then owner of the claims against the bank, could not have acquired any preference over its other general creditors in respect to the moneys thus received by it on account of the payment of the note against the defendants. Their failure to pay it when due ought not to place them in any better position than they would have occupied had they faithfully discharged their own obligation at maturity, according to its terms. It would be a strange principle in equity which would enable a party to derive an advantage from his own delinquency which he could not otherwise have enjoyed. When the receiver was appointed, Kimball was the sole owner of the three notes against the bank, which are now sought to be used as an equitable off-set to its claim against the defendants. This claim was overdue. It was a joint one in favor of the bank against both defendants. It had no connection with the notes then belong-

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ing to Kimball, having originated in an entirely separate and distinct transaction. These notes were joint demands against the bank and Tidd & Fales, and not yet due. The respective claims being thus wholly independent of each other, and between different parties, they do not occupy the position of mutual demands between the same parties, originating in a mutual credit, and there was clearly no connection between them upon which, under any circumstances, a court of equity could act for the purpose of compelling an equitable off-set, or that would justify the application of any other rules in respect to the matter of set-off than those recognized at law. 2 Story's Eq. Jur., §§ 14-34 *et seq.*; *Birdsall v. Fisher*, 17 Minn. 100; *Greene v. Darling*, 5 Mason, 201.

The mere fact that the bank and Tidd & Fales became insolvent after giving their joint notes to Kimball could not operate to change the character or terms of these obligations, or hasten their maturity. Hence, if the due note sued on was the individual obligation of Kimball, this circumstance of insolvency alone would furnish no equitable ground for postponing its payment till the maturity of his notes against the bank, or for compelling an application of the former upon the latter in the way of set-off. *Bradley v. Angel*, 3 N. Y. 475. But in this case, the note due the bank was not the individual note of Kimball, but the joint note of both defendants, and certainly he had no right, when the receiver was appointed, to insist upon a suspension of the payment of such obligation, because he had individual claims against the bank and others, payable at a future day.

For these reasons, the demurrer to the answer was properly overruled, and the order appealed from is affirmed.

Order affirmed.

O'BRIEN V. CITY OF ST. PAUL.

(25 Minn. 333.)

Municipal corporation — liability for injury by surface water.

If a municipal corporation, in improving its streets, accumulates surface water and turns it in new and destructive currents upon the lands of adjoining owners, it is liable in damages.*

* See *Lynch v. Mayor* (76 N. Y. 60), 32 Am. Rep. 271.

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ACTION for injury by surface water. The opinion states the case. The defendant had judgment below.

James B. Beals, for appellant.

Wm. P. Murray, for respondent, cited Dill. on Mun. Corp., §§ 797-800; *Bowlsby v. Speer*, 2 Vroom (N. J.), 351; *Flagg v. Worcester*, 13 Gray, 601; *Town of Union v. Durkes*, 9 Vroom (N. J.), 21; *Turner v. Inhabitants of Dartmouth*, 13 Allen, 291; *Hoyt v. City of Hudson*, 27 Wis. 656; *Bailey v. Mayor of New York*, 3 Hill, 531; *Hatch v. Vermont Central R. Co.*, 25 Vt. 67; *Wilson v. Mayor of New York*, 1 Den. 595; *Mills v. Brooklyn*, 32 N. Y. 489.

GILFILLAN, C. J. Appeal from an order sustaining a general demurrer to the complaint. The substance of the complaint is: That the city established the grade of, opened, graded and improved Hoffman avenue, a public street in the city, extending along and upon the side of a high bluff, known as Dayton's bluff. Conway street, another public street, intersects Hoffman avenue nearly at right angles, and extends down the face of the bluff. Down the face or surface of this bluff a large amount of water, from a great extent of country beyond it, drains, at the time of every considerable fall of rain, and before Hoffman avenue was graded, reached the flat below by means of many natural channels or depressions in the face of the bluff, without flowing upon plaintiff's lots, which lie down the bluff, about fifty feet below the grade of the avenue. The grading and improving of the avenue interfered with the natural flow of the water falling in rains, upon, back of and beyond the bluff, diverted it from its natural channels, and caused it to flow along the avenue from both directions to its intersection with Conway street, and to collect at that point in great and dangerous quantities, so as to flow with great violence over the grade of the avenue upon the lots below. The city (negligently, as is alleged) failed to care for, or carry away, or provide any means for carrying away, the water accumulating at that point in times of rain. On two specified occasions, great and dangerous quantities of water, which had fallen in showers, collected, by reason of the grade of the avenue, at its intersection with Conway street, and was discharged from the avenue upon lots abutting thereon, and over said lots upon the lots of plaintiff, doing great damage.

There is, in the complaint, a general allegation that in all respects the grading and improving of the avenue was negligently and improperly done, and that the city negligently and wrongfully failed to keep the avenue open and in good repair, and free from obstructions and nuisances, as it is bound by its charter. But it is not alleged in what particulars (aside from so establishing the grade, and grading, as to accumulate surface water, and failing to make provisions for preventing the accumulated water flowing upon and injuring private property), the grading was negligently or improperly done ; and those indefinite allegations are not sufficient to raise any material issue.

The only point presented by the complaint is as to the right of a municipal corporation to so grade or improve its streets as to collect surface waters in large and dangerous quantities, and permit them to discharge upon lots of private owners, injuring or destroying them, without making compensation. The question has never before been presented to this court. *O'Brien v. City of St. Paul*, 18 Minn. 176, was a case of unlawful interference with a natural water-course, and all the decisions hold that for such an interference a municipal corporation is liable to the same extent as a private person. *Kobs v. City of Minneapolis*, 22 Minn. 159, was not a case of water collected and discharged upon private property, by grading or improving a street, but of water discharged upon one lot, for the purpose of relieving another. In *Lee v. City of Minneapolis*, 22 Minn. 13, there was no accumulating of surface-water, but, as a consequence of raising the grade of a street, the rain-water falling upon it spread into the lot of the plaintiff ; and in *Alden v. City of Minneapolis*, 24 Minn. 254, the street grades did not turn upon the plaintiff's premises any greater quantity of water than in the natural condition of the surface would have settled there ; and the only question was, whether a municipal corporation is liable for neglecting to construct sufficient sewers and gutters, where the necessity for them is not created by the act of the corporation. In the first of these two cases, the court held the corporation liable ; in the last two, not liable. There are many cases, of which a leading one is *Radcliff v. Mayor of Brooklyn*, 4 N. Y. 195, to the effect that for consequential damages to private property, caused by grading streets within the authority conferred on a municipal corporation, there is no remedy to the owner, unless one is given by statute ; and some cases, following the one

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cited, have applied the principle where the damages were not merely consequential, but direct and immediate. Other decisions attribute to a municipal corporation, in the control and improvement of streets for public use, the same rights and power as a private owner has over his own land, subject to the same liabilities; and hold that the corporation will be liable for damages caused to private property by grading streets, when a private owner of the soil over which the streets are laid would be liable if improving it for his own use; and that the right to cause damage beyond that which a private owner may cause without liability must be acquired through the right of eminent domain. *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 id. 132; *Same v. Reed*, 57 id. 29; s. c., 11 Am. Rep. 1; *Rhodes v. Cleveland*, 10 Ohio, 159; *McCombs v. Akron*, 15 id. 474; *Flagg v. Worcester*, 13 Gray, 601; *Pettigrew v. Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50; *Hoyt v. City of Hudson*, 27 Wis. 656. The principle of this latter class of cases we deem to be most sound, as it is most in accordance with justice and with the protection to private rights against encroachment by the public, which the Constitution aims to give.

The right of the corporation to establish such a grade for a street, and to improve it as the public interest may require, is consistent with this rule. For a private owner, in improving his land, may raise or lower its surface, although coterminous lands may be thereby rendered less desirable. And if the grade established for a street make access to an abutting lot less convenient than before, still the owner has no legal cause of complaint, for he has no right to a use of the street inconsistent with the public use; his rights in it, both for passage and access, are subject to the public right, and to the power of the proper authorities to make it fit and convenient for public use.

As to what may be done by coterminous owners as affecting surface water, the decisions of the courts in the different States are conflicting. Some of them admit the doctrine of servitudes as it exists in the civil law, holding that an owner has no right to interfere with the flow of such water so as to injuriously affect other lands; that he is bound to permit it to flow as it would from the natural formation of the surface, either from his upon adjoining land, or from adjoining land upon his, neither obstructing, increasing nor diminishing it, nor changing its course; and that his right to improve his land is controlled by his obligation. Others assert the absolute

dominion of an owner over his land, and the right to do with it what he pleases. It is a maxim of the common law that the owner of the soil owns not only the surface, but all above and all below it. In a natural water-course, there is a right of property in all the owners through whose land it flows, and the right of each owner is qualified, being morely the right to use its water in the customary way, as it flows over his land. Surface water, however, is of too casual and fugitive a nature to be, at the common law, the subject of property rights, except that while actually on one's land, and in his possession, as it were, he may generally do with it what he will. It has been called a common enemy, which each owner may get rid of as best he may; and some cases, and not a few indeed, maintain the owner's right to adopt any means he may choose to prevent it coming on his land, or to turn it off from his land, without regard to the consequences which may ensue to others. These cases are founded on an owner's assumed right to do absolutely what he will with his own. This right, however, is somewhat restricted by the maxim that a man must so use his own as not unnecessarily to do injury to another—a maxim which grows out of the necessities of society, and without which society would be hardly possible. A man's right to use his property is restricted, for instance, to the manner in which such property is ordinarily used (*Radcliff v. Mayor of Brooklyn*, 4 N. Y. 195); and it must be apparent that a man may do many things with his land in the country, which he could not be permitted to do in a crowded city. An owner may improve his land for the purpose for which such land is ordinarily used, and may do what is necessary for that purpose. He may build upon it, raise or lower its surface, even though the effect may be to prevent surface water, which before flowed upon it, from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over a land on which it would not otherwise go. *Rawstrom v. Taylor*, 11 Exch. 369; *Bentz v. Armstrong*, 8 W. & S. 40; *Goodale v. Tuttle*, 29 N. Y. 459; *Frazier v. Brown*, 12 Ohio St. 294; *Gannon v. Hargadon*, 10 Allen, 106.

His right to adopt such means of improvement, by building, ditching, or otherwise, as to accumulate the water, and discharge it in large and destructive quantities directly upon adjoining land, is perhaps more questionable. The spread and diffusion of the water over the coterminous land is a necessary consequence of im-

provement, where raising the surface is necessary for that purpose, and the injury caused is ordinarily slight ; while discharging the water in torrents is seldom unavoidable, and usually the result of caprice and whim on the part of the owner improving, and likely to be attended with serious consequences. Although we are not prepared to say that in no case can an owner lawfully improve his own land in such a way as to cause the surface waters to flow off in streams upon the land of another, we do not hesitate to say that he may not turn the water in destructive currents upon the adjoining land, unless it be necessary to the proper improvement and enjoyment of his own land. *Nevins v. Peoria*, 41 Ill. 502 ; *Aurora v. Gillett*, 56 id. 132 ; *Aurora v. Reed*, 57 id. 29 ; s. c., 11 Am. Rep. 1 ; *Pettigrew v. Evansville*, 25 Wis. 223 ; s. c., 3 Am. Rep. 50 ; *Hoyt v. Hudson*, 27 Wis. 656 ; *Livingston v. Macdonald*, 21 Iowa, 160 ; *Indianapolis v. Lawyer*, 38 Ind. 348 ; *Rhodes v. Cleveland*, 10 Ohio, 159.

From the complaint there does not appear any necessity, in grading the avenue, to collect the water at the point indicated, nor any difficulty in conducting it off without injury to private property, if it was desirable to so grade the avenue as to accumulate the water there. Having accumulated the water there, it was the duty of the city to take care of it — certainly, if reasonably practicable — and prevent it injuring others. *Byrnes v. Cohoes*, 67 N. Y. 204.

Order reversed.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

GRIFFITH V. TOWNLEY.

(89 Mo 18.)

Mistake — law and fact — relief in equity.

An administrator sold lands of his intestate to B, both supposing the fee was conveyed, whereas only an equity of redemption passed. *Held*, that equity would relieve the purchaser.*

BILL for foreclosure, etc. The opinion states the facts. The complainant had a decree below.

Ewing, Smith & Pope, for appellant.

Lay & Belch, for respondent.

SHERWOOD, C. J. In 1864 one Lewis Welton borrowed of Mrs. Peninah Townley, as representative of the estate of her husband, John M. Townley, deceased, \$4,600, giving a note therefor, and securing the note by a deed of trust on certain land, K. W. Townley being the trustee. Welton died without having paid any por-

* See note, 15 Am. Rep. 171

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tion of either principal or interest of the note. His estate was administered by one Jesse Welton, in 1866, who came to K. W. Townley, the trustee and agent for his mother, and induced him to have the note allowed against the estate, saying that if he would do this, he, the administrator, would have the court make an order for the sale of the land, when it would bring much more than if sold under the deed of trust alone.

After this claim was allowed, as well as some others of minor importance, the administrator procured an order of sale for the payment of debts as he had promised, and the sale took place, Townley, as the agent for his mother, becoming the purchaser of the land mentioned in the deed of trust, for the sum of \$6,000; purchasing on the faith of the public statements and representations of the administrator at the sale (who acted as auctioneer, and also bid against him, and asked him to bid on the land), that he would "sell a clear title;" that the land would be free from incumbrance; that he would pay Mrs. Townley's note. McCord, attorney for the estate of Welton, also told Townley, who made inquiries of him at the time of the sale respecting the title, that the title would be all right, and to "go on and purchase."

The testimony is without rebuttal, and conclusive as to these statements of the administrator. There is also uncontradicted testimony to the effect that Welton, just when the land was knocked off, stated "that the land had brought barely enough to pay off the mortgage of Mrs. Townley, and the expenses." There is also similar testimony to the effect that when inquiry was made, immediately after the land was stricken off, the reply was made, either by Welton, McCord or Townley, that the last named "had got the land to satisfy the mortgage." Six thousand dollars was all the land, in absolute fee, was worth.

There was nothing in the proceedings in any manner referring to the deed of trust. The order of sale, however, though in usual form in other respects, requires the sale of "all the right, title and interest of the said Lewis Welton," in the land mentioned in the order. But the petition for the sale, the order of publication, the certificate of appraisement, the report, the order approving it, and the deed, are in the customary form where the land is sold for the payment of ordinary debts, and give not the remotest indication that any thing less than the fee was sold, or intended to be sold.

In addition to that, and confirmatory of the indications borne by

the probate files and records, one of the county justices stated that some objections were raised to the approval of the report ; that the appraisers were sent for, who "stated that they had appraised the whole value of the land, without reference to the mortgage ;" and it was upon this understanding, *i. e.*, that the whole title was appraised and sold, that the county court approved the sale. Upon this approval, and the delivery of the deed, Townley delivered Welton's note, then amounting with accrued interest to some \$5,040, to the administrator, paid in money the difference between the note and his bid, and acknowledged satisfaction on the record of the deed of trust.

Welton's administrator died, and his administrator, Jacob Hull, administered upon the estate of the deceased administrator, made a settlement of the estate of Lewis Welton, and that estate is now free from debt. The present proceeding, instituted by the public administrator of Osage county, as administrator *de bonis non* of Lewis Welton's estate, has for its object the cancellation of the entry of satisfaction on the record, the substitution of the public administrator to the rights formerly possessed by Mrs. Townley as creditor of the estate, and that the deed of trust be foreclosed. The prayer of the petition was granted, and a decree as prayed for entered, the debt then amounted to over \$10,000. We are now asked to give our sanction to this decree; the plaintiff claiming in support of it, that only the equity of redemption passed by reason of the probate sale ; that if any mistake has occurred it was a mistake of law ; a mistake of such a fatal character that equity, with all its beneficent and healing powers, possesses no ability to redress.

It must be confessed that this position is in accordance with the general and very salutary rule, and the only inquiry to which we must address ourselves is whether the circumstances of this case are such as will, in the present instance, prevent that rigid rule from having its customary sway. In the *Bank v. Daniel*, 12 Pet. 32, it was said, quoting from *Hunt v. Rousmaniere*, 1 Pet. 15, "whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character." The brief limits of an opinion will not admit of detailed examination of the numerous and often conflicting authorities respecting the extent to which courts of equity proceed in relieving against mistakes of law. If, however, the principle to be deduced from the great current of authority on this vexed ques-

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tion is correctly announced in the case just cited, then the inquiry must be, are there in the present instance such ingredients as entitle it to be placed in the narrow and infrequent list of exceptions to a generally prevalent rule? We cannot doubt that Townley acted, when making the purchase at the administrator's sale, under the confident belief that he was purchasing "a clear title," or title in fee; nor can we doubt that under this belief, he paid the difference between the amount of the note and the bid, surrendered that note and acknowledged satisfaction of the deed of trust. And it is equally beyond question that he was led to this course by the promises and assurances of the representative of the estate, Welton, who, doubtless, as evinced by his contemporaneous declarations, supposed he was selling the land in fee simple absolute. If this was the belief of both parties, then it follows that if Townley did not by his purchase procure the fee as he intended, and as Welton intended he should, then it is a case of mutual mistake, one of so fundamental a character as appeals very strongly for equitable interposition. If, on the other hand, Welton was actuated by no honest purpose in the course which he pursued, and the representations which he made, then the contract of sale was tainted with such fraud as to utterly vitiate its validity. But whether the contract was the result of mistake or fraud, in either event an unconscionable advantage has been obtained by selling a barren and worthless equity of redemption, which the purchaser did *not* intend to buy, for the full price of a title in fee, which the buyer *did* intend to buy, and which the administrator, if honest, did intend to sell him.

These are circumstances of such peculiar character, as ought, it seems, to go far toward mitigating the rigor of the general rule. In short, this case may be said to rest, as Mr. Justice STORY observes of another (1 Story's Eq. Jur., § 118), upon "mixed considerations" and not exclusively upon mere mistake or ignorance of the law. Where there was a mutual mistake of parties as to the interest of the vendor in the land sold, the Court of Appeals of Virginia held that the sale should be set aside. *Irick v. Fulton's Exrs.*, 3 Gratt. 193. And this, notwithstanding the whole matter arose from a mutual misconstruction of a deed and a will, and equitable relief was asked solely on the ground that the vendor and the vendee both believed that the former only had an undivided interest in the land sold, when in truth she possessed the fee. Chief Justice RED-

FIELD, in his recent edition of Story's Equity Jurisprudence (vol. 1, § 138), remarks: "That where the mistake is of so fundamental a character that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, * * equity will interfere, in its discretion, in order to prevent intolerable injustice. This we believe to be the clearly defined and well established rule upon the subject, in courts of equity, both in England and America." Lord Chancellor THURLOW, in *Calverly v. Williams*, 1 Ves. 210, says: "No doubt, if one party thought he had purchased *bona fide*, and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say one shall be forced to give that price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only. Upon the other hand, if both understood the whole was to be conveyed it must be conveyed." A similar ruling was made in *Brown v. Lamphear*, 35 Vt. 252, where a vendor conveyed a lot of land on which was a spring, from which he, by means of an aqueduct, supplied his premises with water, the aqueduct being of greater value than the price paid for the land. The vendor did not intend to part with the right to use the water from the spring, but by mistake his deed to the vendee contained no reservation of such right, the latter being in ignorance at the time of his purchase of the existence of the spring. And it was held upon bill brought, that the vendor was entitled either to a conveyance from the vendee of the right to use the aqueduct, or to a re-conveyance of the land on re-payment of the price thereof, the vendee to have his election as to which of these modes of relief the vendor should have, the court, among other things, remarking: "The defendant takes by the conveyance a value which he did not purchase, and the case presents such elements of mistake and surprise as afford a solid ground for relief." Mr. Justice STORY says: "Cases of surprise, mixed up with a mistake of law, stand upon a ground peculiar to themselves, and independent of the general doctrine. * *"

When the surprise is mutual, there is of course a still stronger ground to interfere; for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts, or have pre-supposed some facts or rights existing,

as the basis of their proceedings, which in truth did not exist. Contracts made in mutual error, under circumstances material to their character and consequences, seem upon general principles invalid — *non videntur, qui errant, consentire*, is a rule of the civil law, and it is founded in common sense and common justice.” 1 Story’s Eq. Jur., § 134. It was decided in *Champlin v. Laytin*, 1 Edw. Ch. 467, that a contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, is as liable to be rescinded as one founded in a mistake of fact. In his opinion in that case, the vice-chancellor says : “If both parties should be ignorant of a matter of law, and should enter into a contract for particular object, the result whereof would by law be different from what they mutually intended, here on account of the surprise or immediate result of the mistake of both, there can be no good reason why the court should not interfere in order to prevent the enforcement of the contract and relieve from the unexpected consequences of it. To refuse would be to permit one party to take an unconscientious advantage of the other, and to derive a benefit from the contract which neither of them intended it should produce.”

The lord chancellor says, in *Stapylton v. Scott*, 13 Ves. 425 : “I admit, where the contract has proceeded upon the mistake of both parties, that avoids the contract at law as well as here.” And an agreement was decreed to be given up upon the ground of surprise, neither party understanding the effect of it. *Willan v. Willan*, 16 id. 82. This exception to the rule is recognized in the case of *Hunt v. Rousmanier*, 8 Wheat. 174, MARSHALL, C. J. saying : “We find no case which we think precisely in point, and are unwilling, where the effect of the instruments is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief.” So, also, in *Tyson v. Tyson*, 31 Md. 134, on the ground of mistake and surprise, a deed, resettling trust, which was signed without having been read, was corrected. The case of *Evans v. Llewellyn*, 1 Cox, 333, is exclusively put in the decree upon the ground of surprise, “the conveyance having been obtained and executed improvidently,” without time for proper reflection. In *King v. Doolittle*, 1 Head (Tenn.), 77, it was held that where the mistake was one both of law and fact, though the latter is the result of the former, relief will be granted, when justice and equity require it. And the court there said: “If

a contract is entered into in good faith, by which it is mutually understood, that for an adequate consideration, the one party shall part with and the other acquire a valid title to property, and it turn out that at the time of the contract, by the operation of some settled principle of law, of which they were alike ignorant, the supposed title was wholly valueless, or did not exist in legal contemplation; in such case, the mistake is not a mere mistake at law; it involves in some measure a mistake of fact as well as of law, as the very idea of title comprehends as well matter of fact as of law.

* * * It is enough that there was a radical defect inherent in the subject-matter of the contract, of which the parties were mutually ignorant. * * * The contract therefore was not what either of the parties understood and intended it should be." In that case the mutual mistake arose because of an omission of an essential provision of the charter of a bank, the copy furnished being unintentionally imperfect. Here, the mutual mistake occurred because of the inadvertent insertion of words, of which both parties were ignorant; words in the order of sale at variance with the petition for that order, with the publication, and with the certificate of appraisement. The parties bargained for the fee, and there was, under the administration proceedings, no fee for sale. The subject-matter of their contract had, in legal contemplation, no more existence than if it had been a dwelling already consumed by fire, or a message already swept away by a flood. "Both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. It constituted, therefore, the very essence and condition of the obligation of their contract." 1 Story's Eq. Jur., § 142.

I find it difficult to distinguish the case of *King v. Doolittle, supra*, from the present one in principle; for it seems quite obvious that the contracting parties in each instance were alike ignorant as to the essential features of the contract they entered into, and of the mistake committed, by reason of the unwarranted omission of words in the one case, and of their unwarranted insertion in the other. But there is another important element in this case which should not pass unnoticed. Townley is induced to have the note allowed against the estate of Welton; he is suddenly called upon to bid at the administration sale; he is afraid to bid for fear of jeopardizing the interests confided to his care; afraid not to bid for fear that his non-action will equally result in detriment to those

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interests. In this extremity he appeals to the administrator, he appeals to the attorney of the estate, if the title on sale will be valid, and they both unite in assurances of its validity. In cases of this sort, it is held that when the mutual mistake is attributable to the agent of the adversary seeking to take advantage of it, equity will relieve. *Green v. Morris & Essex R. R. Co.*, 1 Beas. 165, Chancellor WILLIAMSON observing: "The mutual mistake is to be attributed to the agent of the defendants. He prepared the deed, and he assured the complainant that it was correct. There was no want of ordinary prudence in the complainant's relying upon his judgment. He was a lawyer by profession, and it was natural and becoming that the complainant should have confided in him." To the same effect are *Woodbury, etc., Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364. In conclusion, we are of opinion that there are, in this case, such elements of absence of consideration, of reliance on the representations of the agent of the estate, of surprise, mutual mistake and unconscionable advantage, as should in equity and good conscience take this case out of the general rule, and forbid our sanctioning the decree; for should we approve that decree, we would thereby, in effect, declare that the heirs of Lewis Welton's estate should retain the unconscionable advantage which they have gained, and become enriched by the very debt of their ancestor.

We therefore, in order to do what the very right and justice of this case require, reverse the judgment and remand the cause, with directions that the court below will, at the option of the plaintiff, either dismiss the petition or order the note to be delivered to Mrs. Townley, as well as the money paid by her, together with interest thereon; cancel the entry of satisfaction on the record of the deed of trust; order the relinquishment of whatever rights were acquired at the probate sale; and then proceed to foreclose the deed of trust, and in so doing, adjust the rights and equities of the parties litigant, in the manner customary where the mortgagee has been in possession. All concur.

Judgment reversed.

Smith v. St. Louis, Kansas City and Northern Railway Co.

SMITH V. ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY
COMPANY.

(99 Mo. 32.)

Master and servant — negligence — duty as to appliances — rails of railway.

A brakeman in the service of a railway company was injured by catching his foot in the guard of a switch. The guard was made of T rail, the kind in general use, and it appeared that U rail would have been safer, although not in general use. The brakeman knew the character of the rail, and continued in the service without objection. *Held*, that the railway company was not responsible in damages.*

ACTION for personal injury. The opinion states the case. The plaintiff had judgment below.

Wells H. Blodget, for appellant.

L. C. Slavens, for respondent.

HENRY, J. Plaintiff was employed as a brakeman by defendant, and in attempting to uncouple some cars, was knocked down and his foot was run over by the car next behind him, inflicting an injury of so serious a nature as to render amputation of the leg above the knee necessary. He went between the cars while they were in motion, removed the coupling pin, then went back to take out the link, and while walking between said cars his right foot outside, and his left foot inside of the rail, his left foot was caught and held fast between the guard-rail and that of the main track. It was thus that the accident occurred, and this action is to recover damages for the injury. The particular negligence alleged in the petition was, first, that the guard-rail was unnecessary where it was placed; and second, that said guard-rail was constructed of railroad iron, known as the T rail, instead of a different kind of rail, which would have been as serviceable to defendant and less dangerous to its employees. The first ground was abandoned on the trial, and plaintiff, relying on the second, introduced evidence tending to show that a guard-rail of railroad iron, known as U rail,

*To same effect, *Steinweg v. Erie Railway* (43 N. Y. 123), 3 Am Rep. 673.

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would have been as serviceable to the company and less dangerous to its servants; that owing to the form of the U rail his foot could not have been caught and held as it was in the T rail.

Donnelly, who testified for plaintiff, stated that the T rail is in general use in this country; that there are some U rails in use on the bridge at Kansas City; that he knew of no other place where that kind of rail was in use. Knickerbocker, for plaintiff, testified that he had had about twenty years' experience in the construction of railroads, laying tracks, etc.; that he worked on the Illinois Central railroad in 1854, and on an Iowa railroad in 1856, and subsequently on the Fort Scott and Hannibal & St. Joseph railroads; that he never had any thing to do with any except the T rail; never saw the U rail; that he knew nothing of it but from the works he studied. The evidence showed conclusively that the T rail is that generally used, and that the U rail is but little used by railroad companies.

The plaintiff had been about six days in defendant's employment when the accident occurred. He had, before entering into defendant's service, been engaged three or four years on the Illinois Central, on which road the T rail was in use. He knew there was a switch at the place where he was injured, and that it was of T rail, and testified that generally there were guard-rails where there were switches, and could not say that he ever saw a switch without a corresponding guard-rail. J. M. Buckley and Mr. Emerson both testified to an experience in railroading of several years, on different roads, and to an acquaintance with the roads running into Kansas City, also the Illinois Central, the Pennsylvania Central, the Lafayette & Indianapolis, the New Albany & Salem and others, and that they never saw any other than the T rail used in the construction of guard-rails.

For the plaintiff the court instructed the jury as follows:

1. If the jury find from the evidence in this cause that the guard-rail belonging to and used by defendant in operating its road, and carrying on its business as a part of said road or appurtenances, was, from the situation or construction thereof, unsafe for employees of said railroad company employed in operating said road, and that the same, i. e., said guard-rail, might have been so made, situated or constructed as could have answered as well all the uses of said defendant in operating its said road, and at the same time have been safe for its employees while engaged in the discharge of

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their duties, in operating said road, and that the defendant knew this, or might have known it by the exercise of reasonable care and diligence, then the jury are instructed that the defendant is liable to the plaintiff for damages for any injuries which, from the evidence, they find he has received in consequence of such unsafe guard-rail, after such want of safety of the same was known, or by the exercise of reasonable care and diligence might have been known to the defendant; and provided, also, they believe from the evidence that plaintiff, when he received such injuries, was exercising ordinary care and diligence, and did not know of such unsafety of such guard-rail.

2. If the jury find from the evidence in this case that the guard-rail used by the defendant, when the plaintiff was injured, was, from its make or construction, unsafe, and that defendant knew thereof, or might have known thereof by the exercise of reasonable care and diligence, and that plaintiff was injured by his foot being caught in said guard-rail, the jury are instructed that the defendant is liable to plaintiff for any injuries he has received in consequence of such defect in the make and construction of said guard-rail after it was known, or could have been known by the defendant; if they further believe that the plaintiff was exercising ordinary care and prudence at the time he received the injury, and did not know of the defect in said guard-rail in its make and construction.

The following, asked by defendant, were refused :

3. The plaintiff was bound to exercise such care and prudence as was commensurate with the danger of the employment in which he was engaged, and if you believe, that at the time of the happening of the injuries complained of, plaintiff was not exercising such care and prudence as was commensurate with the danger incident to his employment, when by the exercise of such care and prudence he could have avoided the injury, then he cannot recover in this action.

15. If the evidence shows that the defendant used, at the place where plaintiff was hurt, the most approved style or kind of tracks and guard-rails, and that the same were in general or universal use in this country, or this part of the country, and that the same were placed or located in the usual or approved methods in use by the best constructed and conducted roads of the country, then, in such case, the plaintiff cannot recover.

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There is a perplexing confusion and conflict in the authorities with regard to the duty of a railroad company to its employees, in the matter of furnishing implements and machinery for them to work with. In some of the cases dangerous and defective machinery and implements are confounded. Machinery is not necessarily defective because dangerous. The most perfect steam engine requires skill and care in its management, and is a dangerous agent. Circular saws, planing machines and nearly all machines used in wood work are dangerous, but not therefore necessarily defective. This distinction must be kept in view in determining all questions which arise in suits for injuries received by employees in using implements and machinery furnished them by the employer.

If the employer furnish defective machinery to an employee ignorant of a defect which was, or might have been, known to the employer by the use of proper care and vigilance, he is liable to the employee for any injury the latter may sustain in operating the machine with proper care on his part. This is all that was decided in *Porter v. Hannibal & St. Jo. R. R. Co.*, 60 Mo. 162. As was said by BACON, J., *Warner v. Erie Ry. Co.*, 39 N. Y. 471: "We are not now dealing with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an employee, and which is answered if the care bestowed accords with that reasonable skill and prudence which men exercise in the transaction of their accustomed business and employments." *Lewis v. St. Louis & Iron Mountain R. R. Co.*, 59 Mo. 495 ; s. c., 21 Am. Rep. 385, is not in conflict with the foregoing views of the New York court in the decision of the question before the court. The plaintiff's intestate was a brakeman, and in coupling cars, stepped along as they moved, partly forward and partly out toward the rail, until he reached the rail, when, taking a step sideways to get clear of the rail, his right foot went into a hole, which caused him to fall, and in falling his left foot was caught by the wheel of the car, which ran over and crushed it. The hole had been dug by steamboat men for a purpose of their own, and had with the knowledge of other brakemen been there several days, and the attention of the

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section foreman had been called to it. The evidence tended to show that plaintiff's intestate was ignorant of its existence. The principal question in the case was, whether the instruction for plaintiff was correct, which declared that defendant was responsible if the risk of injury to the plaintiff was increased by the hole being there, and it was allowed to remain after defendant knew of its existence, or might, by the exercise of reasonable diligence and care, have known thereof, and if the injury was received in consequence of the hole remaining after defendant knew, or might have known of its existence. Upon the hypothetical case thus put to the jury, no doubt could be entertained of defendant's liability. The instruction was proper, and the court so held, but the principle controlling that case is wholly inapplicable to this. In discussing the questions involved in that instruction, WAGNER, J., who delivered the opinion, remarks: "The rule has long been established, and it is founded in reason and justice, that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passenger or servants, or others. They are bound to furnish a safe road, and sufficient and safe machinery or cars. The legal implication is, that the roads will have and keep a safe track, and adopt all suitable instruments and means with which to carry on their business." This paragraph of the opinion is relied upon by respondent, and if it is to be taken literally, without qualification, it furnishes some support to the doctrine announced in plaintiff's first instruction. What is meant by a safe track is not very clear. An absolutely safe track is one on which no accident could occur, attributable to the track. On the best roads, in construction and management, accidents do occur, and a strictly safe track is nowhere to be found. The remarks we have quoted, taken literally, without qualification, are disapproved.

The plaintiff who avers, must prove negligence. Is the fact that there is another kind of rail, of which a guard-rail might be constructed which would be safer for employees, and would equally answer its purpose, sufficient to render the company liable to an employee for injury received by him in consequence of the failure of the company to use that other kind of rail? Is proof of that fact proof or any evidence of negligence on the part of the company? Plaintiff's first instruction declares that it is. Wharton, in his **Law**

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of Negligence, section 213, says : " An employer is not required to change his machinery in order to apply every new invention, or supposed improvement in appliance, and he may even have in use a machine or an appliance for its operation shown to be less safe than another in use, without being liable to his servants for the non-adoption of the improvement ; provided the servant be not deceived as to the degree of danger that he incurs." Again, in section 244 : " When an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure. Hence, to turn specifically to the consideration of the employer's liability, an employee who contracts for the performance of hazardous duties, assumes such risks as an incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain." The authorities cited by him in support of these propositions fully sustain the text. Take the case of an engineer, who for years has been operating just such an engine as that he is employed to run, and is injured by an explosion which would not have been so likely to occur if an improvement or appliance had been furnished by the employer, in use elsewhere. Would the employer be liable to him in an action for damage because he had not furnished such improvement or appliance ? If the railroad companies are required to take up their rails whenever a better rail is manufactured, because it would afford greater security to their employees, and to discard their machines whenever a more perfect machinery is invented, or be liable to any employee who may be injured in using the old machinery, it would impose upon them pecuniary burdens which would compel them to suspend the operation of their roads.

In *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411 ; s. c., 3 Am. Rep. 143, the court remarks : " In the case before us the question depending upon a diversity of opinion as to whether the eye-bolt or the hook is the better mode of fastening the brake, is immaterial, as both seem to be approved appliances, tested by trial and experience ; and if it were conceded that the eye-bolt has superior merits, it by no means follows that the defendant was bound to discard the hook that had been used for a long time, and on so many trains without accident. A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliances, and he may even have in use a machine

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or an appliance for its operation shown to be less safe than another in general use, without being liable to his servants for the consequence of the use of it. If the servant thinks proper to operate such machinery, it is at his own risk, and all that he can require is that he shall not be deceived as to the degree of danger that he incurs." Wood, in his *Law of Master and Servant*, says, § 331: "The employer is not bound to employ the latest improvements in machinery, and is not liable for an injury which might have been avoided if such improved machinery had been in use."

In *T. W. & W. Ry. Co. v. Asbury*, 84 Ill. 434, which was an action by his administrator to recover damages for an injury received by an employee, the court remarked: "They (railroad companies) are not required to seek and apply every new invention, but must adopt such as are found, by experience, to combine the greatest safety with practical use." That case goes far enough in that direction, and we think too far in regard to the duties it exacts of the employer to the employee. The principle announced in the above extract applies to the relation of carrier and passenger, but is more exacting of the companies, with respect to employees, than we think warranted by the authorities. There is no fault to be found with what was decided in the case. It is an authority, we think, against this plaintiff's first instruction, considering the evidence in the cause. Even the doctrine announced in the paragraph quoted from that case will not sustain the judgment in this. The evidence does not show that U rail "has been found by experience to combine the greatest safety with practical use." Reason and the weight of authority alike condemn the first instruction given for the plaintiff. The liabilities of railroad companies to their passengers, and their liability to their employees, are to be distinguished, as in *Warner v. Erie R. R. Co.*, 39 N. Y. 471, and *Tinney v. Boston & Albany R. R. Co.*, 62 Barb. 218. The highest degree of diligence is required in the one case, and the lower standard in the other.

Applying these principles to this case, what right has plaintiff to recover from the company? He was an experienced railroad man, thirty-five or forty years of age, had worked for years on railroads constructed as defendant's was. He had never seen any other than a T rail used. He knew that the guard-rail was at the place where he was injured, and that it was made of T rail. This was his own testimony, and he proved by other witnesses that the U rail would have been less dangerous, although it was but little used in this

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country, his own witnesses stating that the most they knew of the U rail they had learned from books, and not from observation. This, with evidence of the particular manner in which he received the injury already detailed, and the extent of his injury, was the case made by the plaintiff, and his evidence neither proved nor had any tendency to prove negligence on the part of the defendant which made it liable in damages for the injury plaintiff received. The instruction asked by defendant at the close of plaintiff's evidence, that it was not sufficient to warrant a verdict for plaintiff, should have been given. The first instruction for plaintiff, as already indicated, was also erroneous. Defendant's third instruction should have been given if there had been any evidence tending to show carelessness on the part of plaintiff, but there was none.

We think that under the circumstances of this case, the fifteenth instruction asked by defendant should have been given. The evidence showed that the plaintiff was fully acquainted with the risk he incurred from the nature of his employment and the kind of rail used for guard-rails on defendant's road. It might not be a proper instruction in a case where the employee was inexperienced and ignorant of the danger he incurred in the work he was employed to perform. The judgment is reversed.

Judgment reversed.

The other judges concur.

KILEY V. CITY OF KANSAS.

(69 Mo. 102.)

Municipal corporation — negligence — duty as to nuisance — dangerous building.

A ruinous wall on private property in a city, dangerously near a public street fell and killed a child in a building one foot outside the limits of the street. The city authorities knew of the condition of the wall, were authorized by the charter to declare and abate nuisances, and there was a city ordinance declaring dangerous buildings and structures nuisances. *Held*, that the city were liable in damages for the death.

ACTION of damages. The opinion states the case. The defendant had judgment below.

Tichenor & Warner, for plaintiff in error.

J. Brumback, for defendant in error. The city is not liable because the power to define the wall a nuisance, and to provide for abatement of such nuisance is legislative, governmental and exercisable for the public good. It is not a power to be used by the city as a proprietor, or for private gain or advantage, as if it were a private corporation. Dill. on Mun. Corp., §§ 39, 754; *Peck v. Austin*, 22 Tex. 261; *Murtagh v. St. Louis*, 44 Mo. 481; *Heiler v. Sedalia*, 53 id. 160; *Grant v. Erie*, 69 Penn. St. 420; s. c., 8 Am. Rep. 272; *Wheeler v. Cincinnati*, 19 Ohio St. 19; s. c., 2 Am. Rep. 368; Shearm. & Red. on Neg., § 153; *Levy v. New York*, 1 Sandf. 465; *Griffin v. New York*, 9 N. Y. 459; *Lorillard v. Monroe*, 11 id. 396; *Western College v. Cleveland*, 12 Ohio St. 377; *Kelley v. Milwaukee*, 18 Wis. 84; *Goodrich v. Chicago*, 20 Ill. 445; *Jewett v. New Haven*, 38 Conn. 396; s. c., 9 Am. Rep. 382; *Hilsdorf v. St. Louis*, 45 Mo. 95; *Hill v. Charlotte*, 72 N. C. 55; s. c., 21 Am. Rep. 451; *Howe v. New Orleans*, 12 La. Ann. 481; *Kennedy v. New Orleans*, 10 id. 227; *Hixon v. Lowell*, 13 Gray, 61; *Jones v. Boston*, 104 Mass. 76; s. c., 6 Am. Rep. 194; *Hewison v. New Haven*, 34 Conn. 136; s. c., 9 Am. Rep. 342; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 93; s. c., 6 Am. Rep. 196. Whether any structure so situated is a nuisance is a judicial question, to be decided by some tribunal, on notice to the owner, before he can be bound, or his property affected or before any one injured for failure to abate can, if ever, claim redress against the city. *Yates v. Milwaukee*, 10 Wall. 505; *Lake View v. Letz*, 44 Ill. 82; Dill. on Mun. Corp., § 308; *Cleveland v. Lenze*, 27 Ohio St. 385.

NAPTON, J. As the only question in this case arises on a demurrer to the petition which was sustained, we insert the petition at large :

Plaintiff states that defendant is a municipal corporation, created by the laws of the State of Missouri, and that defendant is, and was, at the time of the hereinafter grievance, a populous city; that by its charter, defendant is empowered to abate all nuisances within the city, that are dangerous to the public, and that the defendant has the right and authority to define what constitutes a dangerous public nuisance within its limits; that by chapter 20 of "An ordinance in

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revision of the ordinances governing the city," approved October 14, 1871, it is ordained, among other things, that all buildings and structures in a situation or manner dangerous to the public are declared to be nuisances, and plaintiff alleges that it is defendant's duty to abate all nuisances, within its limits, of a character dangerous to the public.

Plaintiff says, that at the time of the hereinafter mentioned grievance, she was, and now is, a widow, her husband being dead, and that at said time she resided in the town of Harlem, Clay county, Missouri, and that her daughter, Maggie Kiley, whose death occurred as hereinafter stated, lived with plaintiff, and that her said daughter Maggie was a minor, of the age of fourteen years; that from and after the 19th day of December, 1872, and continuously from that date until the 9th day of February, 1873, defendant negligently and carelessly permitted and suffered an insecure and dangerous wall, the same being about forty feet high, the remains of a brick building to stand and remain on part of lot No. 86, in Swope's addition to said city, being at or near the corner of 12th street and Grand Avenue, streets of defendant, and the same being a locality much frequented by the public; that said brick wall was liable at any time, during the period aforesaid, to fall down on, over and upon, persons passing along the west side of Grand Avenue street, and thereby injure them; and that during all of said time defendant well knew the dangerous condition of said wall; that said brick wall, so permitted to stand and remain as aforesaid, was, at the time plaintiff's said daughter was killed as hereinbefore stated, and for some time prior thereto, a dangerous public nuisance, the same being liable to fall down and upon persons passing on said street, but that the same was negligently and carelessly permitted to remain in that situation by defendant, and that on the 9th day of February, 1873, while her said daughter Maggie Kiley was in a small house adjoining said wall, and while she was standing within one foot of the sidewalk on the west side of said Grand Avenue, and using ordinary care, said brick wall fell down on and upon her said daughter Maggie and thereby killed her. Plaintiff says she has sustained damages in the sum of \$5,000, for which sum and costs she asks judgment in accordance with chapter 147 of the statutes of this State, in such cases made and provided.

It seems from this petition that the charter gave the city legis-

lative power to prevent, abate and remove nuisances, and also to define and declare, by ordinance, what should be deemed nuisances, and it is averred that by an ordinance, passed in 1871, it was ordered, among other things, that all buildings and structures, in a situation or manner dangerous to the public, should be deemed nuisances. The duty of the city to abate such nuisances as were thus declared dangerous to the public is averred. The nuisance in this case was a decayed brick wall forty feet high, the remains of a burned building, which had been at the time of its fall standing for two years, at the intersection of two streets. It is alleged that it was a dangerous nuisance to the public, and that plaintiff's daughter was standing within a foot of the sidewalk when the wall fell and killed her.

It is not very easy to perceive upon what grounds this demurrer was sustained. Two objections have been suggested in the argument submitted to this court by the city counsellor, which I will proceed to notice. The first is, that this wall was upon a private lot over which the city had no control. But could this fact alter the character of the nuisance and deprive the city of a power expressly conceded to it by its charter? In Wood on Nuisances, § 744, it is said that when a municipal corporation has ample power to remove a nuisance which is injurious to the health, endangers the safety or impairs the convenience of its citizens, or when, in the prosecution of a public work, it creates a nuisance, it is liable for all injuries resulting from a failure to properly exercise the power possessed by it, and for the injuries resulting from its wrongful acts. The case of *Parker v. Macon City*, 39 Ga. 729, is a decision upon this point. The charter of that city authorized the council to keep the streets in good order, and to remove any obstructions or nuisances, and to keep the streets in a condition that persons could pass them with safety. In that case, as in this, it was insisted that the wall, claimed as a nuisance, which was at the edge of the sidewalk, was on private property, and not in the street. To this objection the court said: "If the city is bound to fill up a pit dug by the edge of the sidewalk, or to fence it off, so that no one may be injured by it, or to remove any thing hanging over the sidewalk, which may work injury to the passer-by, why is it not bound to remove a crumbling wall, standing so near the sidewalk as to fall upon it? In this case the wall was two stories high, and stood exposed to the weather for several months after the house

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was burned. It was immediately upon the edge of the sidewalk, and could not fall in that direction without falling upon it, and the declaration alleges that it was, from its character and position, insecure and endangered the lives of passengers upon the street. If so, it was a nuisance which it was the duty of the mayor and council to take the necessary steps to abate, and having failed to do so, they are liable for the damages." In the case of *Bassett v. City of St. Joseph*, 53 Mo. 290; s. c., 14 Am. Rep. 446, the same doctrine was declared by this court. The plaintiff in that case was precipitated into an excavation on a private lot, and the city was held equally liable, whether the excavation extended into the street or not. Judge VORIES observes: "It would not be difficult to imagine many cases in which it would be as much the duty of the city authorities to protect the public, who travel its streets and highways, against dangers which do not actually form part of the street, as it would be to protect them from obstructions or excavations forming a part of the street."

The next objection taken to the petition is, that the child killed by the falling of the wall was not in the street or sidewalk, but was in a building a foot outside of the sidewalk. It is perfectly immaterial what position is occupied by the person injured, if the death is occasioned by the negligence of the city in failing to remove a nuisance. The question in such cases is, whether the injury is occasioned by a public nuisance which it was the duty of the city to remove. Had this wall been standing in the center of a lot or block belonging to a private person, the city may not have been liable for injuries resulting from its fall, but that would be, not because of the particular position of the person injured, but because the wall was not a public nuisance. It would certainly be remarkable that where a wall is just on the edge of a public street in a populous city, and a passer-by on the sidewalk should happen to step off the walk and go behind the wall on the opposite side to the street, or at either end of it, there could be no liability, which it is conceded would have existed had he remained in the street. Such a discrimination it would be difficult to characterize in terms complimentary to the law. The position of the person injured is a matter of no importance. The question is, whether the injury resulted from a neglect of duty on the part of the city, and this depends on the question whether the immediate cause of the injury was a public nuisance. As to the necessity of

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a previous judicial determination before the city authorities were obliged to act, the charter expressly confides that power to the city, and they had exercised it in this case by declaring the decayed wall a public nuisance. The judgment is reversed and the cause remanded.

Judgment reversed.

The other judges concur.

CONOVER V. BERDINE.

(69 Mo. 125.)

Evidence — fraud — reputation of insolvency.

In support of a charge of fraud in inducing the plaintiff to accept worthless notes in payment for property, evidence that the maker was reputed insolvent where he and the defendant lived is competent.

ACTION for the price of goods. The opinion states the case. The defendant had judgment below.

J. E. Havens, for plaintiffs in error.

A. A. Tomlinson, for defendant in error.

HOUGH, J. This was an action to recover the price of a piano sold by the plaintiffs to the defendant, in payment for which the defendant transferred to the plaintiffs, by delivery, the promissory notes of one J. E. Morris, amounting in the aggregate to \$549.65, which notes the plaintiffs alleged the defendant falsely and fraudulently represented would be paid at maturity, well knowing at the time that the said Morris, who resided in Atchison county, Kansas, was wholly insolvent, and that said notes were worthless. It was further alleged that plaintiffs accepted said notes in payment, relying upon the representations aforesaid.

All the notes were reduced to judgment, and a return of *nulla bona* was made under each judgment. During the progress of the trial, the plaintiffs, with a view of showing that the defendant had knowledge of the insolvency of Morris, “offered to prove by a witness who resided in Kansas city that Morris was notoriously insolvent by the statements made of him by merchants, bankers and

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others in the city of Atchison, in which city the defendant resided." This testimony was excluded, and the finding of the court was for the defendant.

No instructions were given or prayed, and the admissibility of the testimony offered is the only matter to be determined. In the case of *Benoist v. Darby*, 12 Mo. 196, where it was sought to prove knowledge on the part of one individual of the insolvency of another, testimony as to the opinion both of the public and the witness of the pecuniary condition of such person was held to be admissible. The court said that where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact among his neighbors is admissible to the jury as tending to show that he also had knowledge as well as they. The same principle was recognized in *Dickerson v. Chrisman*, 28 Mo. 134. In *Lee v. Kilburn*, 3 Gray, 594, it was held that on an issue whether the defendant had reasonable cause to believe certain persons to be insolvent, it was clearly competent to show that they were reputed to be insolvent. To the same effect are the cases of *Bartlett v. Decreet*, 4 Gray, 113, and *Carpenter v. Leonard*, 3 Allen, 32. So, also, in the case of *Sheen v. Bumpstead*, 1 H. & C. 357, which was an action for fraudulently representing that a trader was trustworthy, it was said that evidence of the reputation of such trader's state of solvency amongst the tradesmen where he did business was admissible. The offer made in the case before us is awkwardly worded and rather indefinite, but we are inclined to regard it as an offer to prove, not simply the statements made by the bankers, merchants and others to the witness relative to the solvency of Morris, but the fact that Morris was notoriously insolvent, and that he knew such fact from the statement of the bankers, merchants and others to him in Atchison. According to the authorities cited it was certainly competent to show that Morris was generally reputed to be insolvent, and the means of knowledge of the witness would be a proper subject of inquiry on cross-examination. The judgment must, therefore, be reversed and the cause remanded.

Judgment reversed.

All concur.

STATE V. TIEDEMANN.

(69 Mo. 308.)

Exemption — school-house.

A public school-house is exempt from execution.

INJUNCTION against selling a public school-house on execution.

Louis Houck and Sam. M. Greene, for plaintiff in error.

Wilson Cramer, for defendant in error.

SHERWOOD, C. J. We are all agreed that the beneficial plaintiff in this action is a public corporation (Gen. Stat., 275, § 6; Sess. Acts, 1867, 160, § 6; Dill. on Mun. Corp., § 10; *Heller v. Stremmel*, 52 Mo. 309), and therefore not subject to the process of execution, at least so far as any school building or property is concerned. 1 Wag. Stat., § 36, p. 295. And this idea finds further support in the avowed policy of this State, evinced in the most decided manner in our organic as well as statutory provisions, to favor and foster popular and promiscuous education, by applying for that purpose, a large portion of the revenues of the State, as well as authorizing local and burdensome taxation for the erection of school buildings and the maintenance of schools. It would greatly tend to frustrate the design and purpose of the law in respect to common schools, were school buildings and property liable to sale under the hammer, as attempted in the present instance. And besides, nothing would be gained by such proceeding; for supposing the school-house sold, it would immediately become the duty of the "board of education" to levy taxes for the erection of a new school-house, and therefore nothing would be gained. As the board, as just seen, is authorized to levy taxes, it would seem that the appropriate method of procedure, in such cases, would be by mandamus to compel the levy of a sufficient tax to pay the indebtedness. Dill. on Mun. Corp., § 446. Such a course would certainly avoid all difficulty, and oftentimes prevent the sacrifice of valuable property. But however this may be, whatever may be the proper course to pursue, we are confident that it would contravene the

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evident policy of our laws to permit school property to go to sale under *fi. fa.*, either general or special. In addition to the foregoing observations, it has been expressly decided by this court that a school-house and lot, the title whereof is vested in a board of education, is not the subject of a mechanics' lien. *Abercrombie v. Ely*, 60 Mo. 23. If not subject to the lien, then not subject to a sale to enforce such lien.

But it is insisted that the beneficial plaintiff had an adequate remedy at law, and, therefore, equity should not interpose injunctive relief. It is true that relief could have been thus obtained, but this does not oust equitable jurisdiction in a case of this sort, for if it be the case that the school-house was not vendible under execution, equity would interfere to prevent a cloud from being cast on the title by reason of a void sale, and also to prevent a multiplicity of suits springing from such void act. *Holland v. Mayor*, 11 Md. 186; *Mayor v. Porter*, 18 id. 284; *Vogler v. Montgomery*, 54 Mo. 577; *Damschroeder v. Thias*, 51 id. 100; *McPike v. Pen*, id. 63.

These considerations induce an affirmance of the judgment of the lower court, which perpetually enjoined a sale of the property levied on.

Judgment affirmed.

All concur

ARMSTRONG v. CITY OF ST. LOUIS.

(69 Mo. 309.)

Municipal corporation — ejectment against, for street.

Ejectment lies against a municipal corporation for land wrongfully taken for a street.*

EJECTMENT. The opinion states the case. The plaintiff had judgment below.

Leverett Bell, for appellant.

Addison Reese and *Frank Hicks*, for respondent.

HENRY, J. The plaintiff sued the defendant, city of St. Louis, in ejectment, for two parcels of land lying in said city, laying his

* Compare *Bay County v. Bradley*, ante, p. 367.

damages at \$15,000 and stating the monthly rents and profits to be \$83.93.

The answer was a denial, and a plea of the statute of limitations, and also, as a defense, that plaintiff had dedicated the premises to the city, to be used as a street, and that the city had proceeded, after said dedication, to improve said parcels of land to be used as a street, and that for ten years next before the commencement of this suit, said premises had, with plaintiff's consent, been used as a street.

[Omitting a minor question.]

The principal question in this case is, whether an action of ejectment will lie against a city, by the owner of land wrongfully taken by the city and converted into and used as a public street. There are authorities which hold that the action cannot be maintained, but the reasons given for it are unsatisfactory.

In *Cowenhoven v. City of Brooklyn*, 38 Barb. 9, the court say: "The claim of the corporation, if any, was to a public right or land, not incompatible with the title of the plaintiff, for it was a mere easement, nor with his possession, for if he owned the fee of the land over which the street passes, he would, in contemplation of law, be in possession of the street, and might maintain trespass against another for any use of the land except for the purpose of travelling." The owner of the land in such case is as entirely deprived of the use of the land as if the city had taken it and claimed to be the owner in fee simple. To say that he is in "contemplation of law in possession of the street," is no answer to the real fact that he is entirely deprived of the possession. He has the same right to travel over the street as any other person, not, however, as owner of the property, but as one of the public, any one of whom can exercise as much dominion over the property as he. He is entirely deprived of his property. He cannot sue the public, or any one travelling on the street, and recover his property; and if he cannot sue the corporation, which has taken and holds possession of the premises as a street, and recover the specific property, then private property may be taken and held for public use, without a compliance with the law providing a mode of condemnation. He may sue and recover its value from the city, and has no other remedy, it is contended; but this would be to hold his property at the mercy of the city, which can take it from him, and compel him to accept in lieu of the property the amount of money a jury may estimate

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it to be worth, or rather, a judgment for this amount, which may possibly never be satisfied, and thus force him to exchange his land, which he may wish to hold, for money or other property, which he does not want. He has a right to the specific property, and no corporation, not even the State, can deprive him of it but in the manner provided by law.

The cases cited from Massachusetts and New Hampshire are not applicable. *Smith v. Wiggin*, 48 N. H. 105, was a writ of entry, in which demandant sought to recover "a right of way, or a passage from Chappel street, at any and all times with teams," etc., and it was held that "ejectment would not lie against one claiming an easement in a parcel of land, to try his right to enjoy the same." If Armstrong were refused the privilege of travelling over the street, and should sue in ejectment to try his right to do so, the case would be in point. What was decided in that case is undoubted law. Armstrong, however, is not suing to recover or to try his right to an easement in the premises in controversy, but to recover the premises, and oust the city, which, whether it claims in the land an easement only, or not, has entirely deprived him of the possession thereof. In the case of *Child v. Chappell*, 9 N. Y. 248, the defendant was not in the exclusive possession of, nor did he claim any such right, to the wharf. His use of the wharf and basin was only temporary and occasional, and not exclusive; and the court therefore held that ejectment could not be maintained.

The writ of entry, as a remedy for the recovery of real property, is retained in New Hampshire and Massachusetts, and will not lie unless both demandant and tenant claim a freehold in the premises. In *Mills v. Pierce*, 2 N. H. 9, which was a writ of entry for "a certain store situated in Deerfield," WOODBURY, J., said: "If, in fact, at the commencement of the action, the tenant was not in possession claiming any interest he should have pleaded *non tenure*, or disclaimed; or if in possession, claiming less than a freehold, he should have pleaded *non tenure special*." In *Smith v. Wiggin*, 48 N. H. 105, NESMITH, J., said: "The demandant in a writ of entry must demand a freehold. It follows that the tenant against whom the action is brought must be seized of a freehold." In *Higbee v. Rice*, 5 Mass. 344, PARSONS, C. J., said: "And it will not be denied, that in *ejectione firmæ*, which is an action of trespass against the defendant for ejecting the plaintiff from his farm, under the general

issue of not guilty, if the parties were tenants in common, the plaintiff, to recover, must prove an ouster by the defendant. We speak not of the fictitious, but of the actual *ejectione firmas*, in which neither the lease, entry nor ouster is confessed. And the reason is evident, because the ouster is not only charged in the writ, but is by the plea put in issue. But a writ of entry will lie only against a tenant of the freehold, and if he does not disclaim or plead *non tenure*, he admits himself to be the tenant of the freehold by the plead of *nul disseizin*." All the cases cited from those States were writs of entry, and it is clear why a writ of entry will not lie there against a city, or town, for land wrongfully taken by it for a street, in which it claims only an easement. This peculiarity of the writ of entry may explain the decisions in New Hampshire and Massachusetts cited by appellant's counsel. The distinction, in this respect, betwixt that form of action and ejectment is recognized by Judge PARSONS in the above extract from his opinion in *Higbee v. Rice*.

The action of ejectment, in its origin, was a mere action of trespass, but ultimately, by a series of fictions, superseded other remedies for the recovery of real property. It is not necessary that the defendant should own, or claim, a freehold estate in the premises or any estate whatever, but it is sufficient that he has ousted the owner. Here the city ousted Armstrong, took his property, converted it into a street, holds possession of it as such, and permits the public to use it for that purpose, excluding Armstrong from any use of the street except in common with the public. In *Crandell v. Taunton*, 110 Mass. 419, the evidence of the superintendent of streets for the city of Taunton was, that he had general care of the streets, and acted under the direction of the mayor and aldermen, and of the city council; that he was ordered to lower the grade of Weir street; "that he lowered the grade, and in doing so, dug down and carried away the soil from the demanded premises, and also carried away certain curbing stones thereon placed, and deposited them with other property of the city; and that he caused the demanded premises to be lowered to the grade of the street, and made a sidewalk, a part of which the demanded premises were; that he did these acts under orders to widen, grade and straighten Weir street, and supposed the demanded premises were a part of the public street; that he thus acted as an officer of the city, and as he supposed, as a part of his duty as superintendent of streets;

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and that the street had continued as when he left it." The court held that these acts did not show an ouster on the part of the city. Whatever may be held in other cases, this is no authority for the position of the city here. The officer acted upon the supposition that the land he trespassed upon was a part of the street. He was only authorized to lower the grade of the street, and no authority to interfere with the premises in question was given him by the city, nor did the city in any manner ratify his act. Defendant, it is true, by plea disclaimed all right in the land, except a public easement in it as a highway, but simply claiming it as a public highway would not amount to an ouster, or a ratification of an unauthorized entry upon the land by an officer of the city.

However this question may have been ruled elsewhere, the reasons assigned for the doctrine in those cases are so unsatisfactory, that we prefer following the intimations of our own court to the contrary, rather than those express adjudications. *Anderson v. City of St. Louis*, 47 Mo. 484, was a proceeding by injunction to restrain the city from taking possession of land for use as a public wharf, plaintiff claiming that the condemnation was illegal. The court said: "If possession were taken of the property by the city, ejectment would lie." *Hammerslough v. City of Kansas*, 57 id. 221, was a suit to enjoin the city from using plaintiff's lot as a street, and the court said: "The remedy of the plaintiffs, if they claim that the sale to the city was void, was an action of ejectment." In *Walker v. Chicago R. R. Co.*, 57 id. 275, this court held, where a railroad company entered upon land of plaintiff and constructed its road upon it, not having proceeded in a lawful manner to obtain a right of way, that it might be ousted by ejectment. The same doctrine, we think, is recognized in *Evans v. M. I. & N. R. R. Co.*, 64 id. 453, and *Walther v. Warner*, 25 id. 277. All that the railroad company in *Walker v. Chicago R. R. Co.* acquired was a right of way, and it claimed no more. The fee simple title remains in the owner after a legal condemnation of the land for a right of way. The railroad company can acquire only an easement in the land taken for a road-bed, and no reason is perceived why, if ejectment can be maintained against a railroad company to recover such land, illegally taken by the company, it will not lie against a town or city for land unlawfully taken by it for a street. The right to maintain an ejectment against a party in possession does not depend upon the right he claims in the premises, but upon the wrong he has

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done the claimant, if the true owner. If he has turned him out of possession and holds the premises against him, it does not matter what interest he claims.

The doctrine of this court on the subject, we think, accords with reason and justice, and the constitutional provision, which forbids the taking of private property for public use without just compensation. It has been uniformly held, that private property cannot be taken for public use, except in strict accordance with the law which prescribes the manner in which it may be acquired for public use. Cooley's Const. Lim. 527; Story on the Constitution, § 1956.

[Omitting a question of damages.]

The judgment is affirmed. All concurring.

Judgment affirmed.

FLORI V. CITY OF ST. LOUIS.

(60 Mo. 341.)

Municipal corporation — not liable for damages by cyclone.

A municipal corporation is not liable for injuries caused by the fall of a public market building, caused by a cyclone.*

ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below.

Leverett Bell, for appellant.

Daily & Adams and *H. A. Clover*, for respondent

NORTON, J. This is an action to recover damages for injuries inflicted on Mary Flori by the prostration of a building known as Center Market, in the city of St. Louis, and is brought before us on appeal from the St. Louis Court of Appeals. The cause is reported in 3 Mo. App. Rep. 231, where the case is as fully stated as the action taken by the Circuit Court during the progress of the

*See note, 18 Am. Rep. 618.

trial, and relieves us of the necessity of repeating here what is said there.

It is, however, proper to say that there was evidence on the part of plaintiff tending to show that the roof of the market-house was blown off and the wall prostrated by a wind storm neither unusual nor uncommon, and only of ordinary force and violence ; there was also evidence on the part of defendant tending to show that the building was thrown down by a storm of unusual force, amounting to a cyclone. The controlling and principal question in the case therefore is, whether the wall was thrown down by an ordinary and usual wind storm, or by an extraordinary and unusual one. If by the former, the city is liable, if by the latter, it is not. The correctness of this doctrine seems to be conceded, and is fully recognized by the Court of Appeals, but the Circuit Court failed to declare it, by refusing the following instruction: "If the jury believe from the evidence that the storm which overthrew the Center Market-house on March 30th, 1872, was one of unusual force and violence, they will find a verdict for defendant." It is said that the error committed in the refusal of the above instruction is cured by the fact that the same principle was contained in the second instruction given for plaintiff, and the first instruction given for defendant. While the principle contained in the refused instruction was embraced in the first given for defendant, an examination of plaintiff's second instruction shows it to be inconsistent with the said first instruction. The jury are told in plaintiff's second instruction that "unless they should believe that the wall blown down was so cast down by the action of an unprecedented or extraordinary wind storm, which was not reasonably to have been anticipated by the city, they would find for plaintiff," while they are told in defendant's second instruction that "if they believe from the evidence that the market-house in question was overthrown by a storm of unusual force and violence, or if they believe from the evidence that the Center Market-house at the time of the accident was fit and able to withstand a storm of ordinary power, then, in either case, they will find for defendant." These instructions are antagonistic to each other, and cannot be reconciled. The vice of the second instruction is to be found in the words "which was not reasonably to have been anticipated by the city."

There was no obligation on the city in the construction and

maintenance of the market-house to anticipate unprecedented wind storms, as required by the instruction. It would be strange doctrine to require defendant to anticipate such a storm as had never before occurred, and provide against it in the erection and maintenance of a market-house. The utmost requirement that could be exacted would be that they should keep the building in such condition as would enable it to withstand the ordinary force and power of ordinary and usual wind storms. The interpolation or addition of the words above quoted in plaintiff's second instruction was calculated to mislead the jury and deprive defendant of the full benefit of the declaration asked, viz.: that if the storm which overthrew the market-house was one of unusual force and violence, they would find for defendant. Because of the misleading character of plaintiff's second instruction and its irreconcilability with defendant's first instruction, the judgment will be reversed and cause remanded, in which all concur. *Goetz v. Hannibal & St. Joseph R. R. Co.*, 50 Mo. 472 ; *Henschen v. O'Bannon*, 56 id. 290.

Judgment reversed.

STATE V. WEST.

(60 Mo. 401.)

Criminal law — jury furnished with intoxicating drink.

A conviction in case of homicide will not be set aside on proof that the jury drank intoxicating liquors while consulting on their verdict, unless it appears that intoxication or other improper conduct was the result.*

CONVICTION of murder. The opinion states the case.

John Cosgrove and W. Y. Pendleton, for plaintiff in error.

J. L. Smith, attorney-general, and *J. H. Johnson*, prosecuting attorney, for the State.

HENRY, J. Defendant was indicted at the November term, 1878, of the Circuit Court of Cooper county, for the murder of a

*To same effect, *State v. Bruce* (48 Iowa, 530), 30 Am. Rep. 403.

man whose name was to the jurors unknown. At the January term, 1879, of said court, he was tried and convicted of murder in the first degree, and sentenced to be hanged. From the judgment of the Circuit Court, he has appealed, assigning numerous errors as having occurred in the trial, among them: First, the rejection by the court for incompetency of the following persons summoned as jurors, viz.: W. Parker, A. Santer, J. P. Moore, Geo. Fluke and W. H. Moore. Second, that the conviction was obtained without proof that the homicide was committed in Cooper county. Third, that the court erred in declaring that Samuel L. Ewing was a competent witness, and permitting him to testify against the defendant. Fourth, that the jury was furnished with intoxicating liquor while the trial was progressing, after they had retired to consider of their verdict. The other error assigned was that instructions were given for the State, which should have been refused, and others asked by the defendant were refused, which should have been given.

[Omitting the other questions.]

On the motion for a new trial, affidavits were filed showing that intoxicating liquor had been supplied to the jury by the deputy sheriff, Williams, who had charge of them. Two and a half quarts were so furnished during the trial, about half of which was procured from the time they retired to consider of their verdict, until they returned the same into court, a period of nearly two days. R. W. Whitlow, one of the jurors, states in his affidavit, that the only time he ever saw whisky drank was in the morning before breakfast, and "at no time did he see a juror take more than one dram a day, and that at no time was any juror under the influence of liquor in the least degree." L. L. Williams, the deputy sheriff, stated in his affidavit that he never saw any juror in the least degree affected by liquor, or either of them take more than one drink during the day. No one testified to any other misconduct of the jury. There is nothing in the affidavits, or any of them, or anywhere in the record, to the effect that any of the jurors were at any time intoxicated, or that the verdict was procured by any improper means. The practice of supplying jurors with intoxicating drinks is not approved, but, on the contrary, is to be condemned as improper. Men who have to determine as grave questions as those submitted to a jury in a prosecution for murder, should so conduct themselves as to excite no suspicion that their verdict, whatever it may be, is the result of any thing but a calm and impartial consid-

eration of the law and the evidence in the case. It should be held a contempt of court for any officer of the court to furnish a jury, or any member of a jury, with intoxicating liquor, except in a case of necessity; but it does not follow that the mere fact that ardent spirits have been furnished a jury, is sufficient to warrant either the trial, or an appellate court, in setting aside their verdict.

In *State v. Upton*, 20 Mo. 399, SCOTT, J., delivering the opinion of the court, said: "We have never lent a willing ear to objections against verdicts, growing out of irregularities in the conduct of jurors, unless such irregularities affected the verdict, or were induced by means employed by the party obtaining it. Whilst the conduct of jurors cannot be too narrowly watched by the courts, yet if they do misbehave, if it cannot be seen that such misbehavior affected the verdict, it has been thought best, under all the circumstances, to leave such misbehavior to the reprehension of the courts, and the punishment imposed by law for it." In that case it was proved on motion for a new trial, that the jury in their retirement used intoxicating liquors, but it was not shown that any member of the jury was at any time intoxicated. Judge SCOTT observed on that subject, that: "No court would be warranted in receiving a verdict against a prisoner from a jury, any member of which was in the least under the influence of intoxicating liquor. But to hold that a verdict should be set aside for the use of ardent spirits by the jury, not carried to an excess, when such spirits are not supplied from a source interested or calculated to bias the minds of the jurors, would be establishing a rule which would result in no practical good, and prove very burdensome to parties."

Judgment affirmed.

All concurring.

MORGAN V. DURFEE.

(60 Mo. 469.)

Assault — self-defense in one's business office — damages.

M., a man who carried concealed weapons and was reputed to be quarrelsome and dangerous, and who was stronger than the defendant, entered defendant's business office, and abused him with opprobrious epithets. Defendant ordered him to leave, but he refused, and continued the abuse. Defendant

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then pushed him with his open hand toward the door, when M. violently throttled him, and moved his hand as if endeavoring to draw a weapon, whereupon defendant, reaching out his hand toward a safe to steady himself, grasped a seal, and struck M. on the head, knocking him down, from which he died.

In a civil action of damages, *held* that the defendant's act was justifiable.

In such an action, evidence of the defendant's wealth is improper, unless it is a case for exemplary damages.*

ACTION of damages for killing plaintiff's father. Evidence was given tending to show that the defendant was worth from \$30,000 to \$40,000. The court gave the following instructions for the plaintiff :

1. If you find from the evidence the defendant wrongfully struck the said Pressley G. Morgan on the head with a notarial seal, and knocked him upon the brick pavement, or by force of the lick he fell upon said pavement, and the blow or fall gave him a wound or wounds upon the head which caused his death, you should find for the plaintiff, and assess his damages as you may believe to be right and proper, not exceeding \$5,000, with reference to the necessary injury resulting from the death of said Morgan to the said minor, the said Alonzo P. Morgan ; also having reference to the aggravating or mitigating circumstances attending the giving of the blow, that is to say : If you find that the blow was not only wrongfully given, but was wantonly and cruelly inflicted in a spirit of hatred or ill-will, and without reasonable provocation, you may allow such sum as you may deem proper under all the circumstances, including punitive or exemplary damages, but if the act of the defendant was wrongful, yet if it was attended with circumstances of provocation and insult, this may be considered in mitigation of damages.

2. If you find from the evidence that the defendant struck the said Pressley C. Morgan on the head with a notarial seal, a dangerous weapon, and thereby knocked him down, and the blow, or the fall, or both combined, caused his death, it devolves upon the defendant to show to the satisfaction of the jury, by a preponderance of the evidence, that he was justifiable in giving the blow in his own proper self-defense ; unless such justification appears from the evidence offered by the plaintiff, it must appear from all the evidence in the case to the satisfaction of the jury that the blow was

*Compare *Brown v. Barnes*, ante, p. 875. The principal case, on account of the division of opinion, cannot become authoritative, and we report it only on account of its somewhat singular interest. See note, 12 Am. Rep. 212.

justifiable on the ground of self-defense. If this so appears, you should find for the defendant.

3. The defendant had a right to order the deceased to leave his office and go out of it, and it was the duty of the deceased to comply with the request or order, and if he refused to do so, the defendant had a right to lay his hands upon him and put him out by force, and if the deceased resisted the defendant by the use of force and violence to his person, either actual or threatened, the defendant had the right to oppose force with force, using such force and measures only as might be reasonably necessary to eject the deceased from his office, but the defendant could have no right to use a deadly weapon and strike the deceased with a dangerous or deadly weapon upon a vital part, for the purpose of forcing or driving the deceased out of his office. But if in attempting to put the deceased out, he, the deceased, resisted the defendant by violence and by assaulting him by taking him by the throat, and the defendant did believe and had good reason to believe that the deceased was about to do him some great personal injury, the defendant had the right to defend himself against such threatened danger by the use of any weapon, even to the extent of taking his life or inflicting an injury that might result in death. It is not essential to this defense that there should be actual or real danger, or that the peril of great bodily harm should be really imminent. If from all the circumstances actually attending the situation at the time of the blow given by the defendant, there was reasonable ground to believe that the deceased designed to do the defendant some great personal injury at the time, and the defendant struck him with the seal to avert such injury, and not in a spirit of malice or revenge, he was justifiable, although there may have been no design on the part of the deceased to do the defendant any serious injury nor danger that it would then be done. The defendant had the right to act upon the appearances, in deciding upon the situation, and whether the defendant had good reason to apprehend real danger at the time. The general reputation of the deceased in the neighborhood as to being a violent, turbulent, dangerous man, or a quiet, peaceable one, as shown by the evidence, as also any threats he may have made shortly before the difficulty, may be considered.

The court refused an instruction offered by the defendant to the effect that on the evidence the plaintiff was not entitled to recover, and also the following, among others :

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7. If the jury believe from the evidence that Pressley G. Morgan went into the law-office of defendant and used loud and offensive language, and the defendant thereupon requested said Morgan to leave his office, and that said Morgan refused so to do, but continued to use loud and offensive language, and thereupon defendant again requested said Morgan to leave his office, and pushed him with his left hand, it was Morgan's duty to comply with said request; and if the jury believe from the evidence that said Morgan, instead of leaving the office, assaulted defendant and laid hold of his person in a violent and threatening manner, and that defendant, in defense of his person and the possession of his office, used such force as was reasonably necessary under the circumstances, then said Morgan, if death had not ensued, would not have been entitled to maintain an action and recover damages on account of the injuries so inflicted by said defendant, and if said Morgan could not have maintained said action, neither can the plaintiff, and the jury will find for the defendant.

Other facts are stated in the opinion. The plaintiffs had judgment below.

Willard P. Hall, for appellant.

SHERWOOD, C. J. Action on behalf of Alonzo P. Morgan for damages for killing his father Pressley G. Morgan. On trial had, a verdict was returned for \$400, and judgment accordingly.

The deceased, who was in the habit of carrying concealed weapons, and had a well established reputation for being a turbulent, quarrelsome and dangerous man, and was, it seems, somewhat the physical superior of Durfee, entered the law-office of the latter, to whom his reputation as a dangerous man was well known, in an apparently friendly manner, though he had just previously made threats in a saloon of his purpose to do him a serious injury. After some conversation, the deceased, Morgan, commenced an altercation with Durfee relative to some business matter; showered upon him the most opprobrious epithets, repeatedly refused to leave the office when told to do so, saying, "he wouldn't go out until he got ready," and still continuing his vile abuse. Durfee, remarking to him, "Morgan, I intend you shall go out," pushed him backward with his open hand, a step or two toward a safe which stood by the open door, when Morgan, seizing Durfee by the throat and beard,

and choking him with one hand so he could scarcely speak, and gesticulating violently with the other, pulled Durfee up to him and toward the door, and was in the act of threatening his life, when the latter, who had not touched Morgan but the once, reached out his hand toward the safe in order to steady himself, picked up a notarial seal and struck Morgan on the head, who, thereupon released his grip on his throat and fell out of the door, and shortly thereafter died, either from the blow or the effect of the fall on the pavement, from the testimony, most probably the latter. Durfee's testimony, which is uncontradicted in any material particular by the only other eye-witness of the transaction, says, when his hand, in his effort to steady himself, fell on the seal, he seized it by its lower part, raised it up and felt it coming over with force, which he resisted, as much as he could, but it struck Morgan's head ; that when he struck with the seal he could scarcely breathe; and that the blow was given at the time the threat before mentioned was uttered, and while Morgan was moving his hand up and down as if trying to get some weapon out of his pocket.

Upon the foregoing testimony, the court refused an instruction for the defendant that plaintiff was not entitled to recover. My opinion of this refusal is, that it was clearly erroneous ; for it appears to me that few cases afford stronger grounds for successful resistance against an action for damage than the present one. Durfee had the unquestionable right to defend his office from ruthless intrusion, and his person against a battery then being inflicted, as well as threatened death. His right was therefore of a two-fold nature, defense of his habitation and defense of his person ; and as coincident with that two-fold right he was invested by the first law of nature with authority to employ all the means within his reach, all the energies under his control, which the apparent necessity demanded, to expel the unwelcome and turbulent intruder, and protect himself against the murderous intentions of a desperate and dangerous man.

In *Hinchcliffe's* case, 1 Lew. C. U. 161 ; Cases Self Defense, 125, upon an indictment for manslaughter, it appeared that the deceased and his servant insisted on placing corn in the prisoner's barn, which she refused to allow. They exerted force and a scuffle ensued, in which the prisoner received a blow in the breast, whereupon she threw a stone at the deceased and he fell down and was taken up dead. HOLROYD, J., said : " This case fails on two

accounts. It is not proved that the death was caused by the blow, and if it had been, it appears that deceased received it in an attempt to invade her barn against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose; and she is not answerable for any unfortunate accident that may have happened in so doing." And under his lordship's direction the prisoner was acquitted.

The principle which dominates that case, it would seem, ought to control this one, unless it can be said that favorable presumptions attend the felling of a man with a stone, but unfavorable, with a notarial seal. That case is also authority for the exercise of the power by a trial court seldom brought into requisition, however, owing to a pitiable and painful weakness in the dorsal region, of directing a verdict for either party where the facts are undisputed and the witnesses unimpeached, or where the verdict, if returned for the opposite party, would be set aside as against the law and evidence. This doctrine is well established. Proffatt on Jur. Tr., §§ 351, 352, 354, and cases cited. This case falls, I think, clearly within the above mentioned rule; and that its circumstances would well have warranted the verdict for the plaintiff in being set aside as the result of either passion or prejudice on the part of the triers of the fact; for it is quite clear to my mind from the evidence that Durfee was either justifiable or excusable, since he was engaged in a lawful act, and only doing what the apparent necessity of the case demanded; and whether justifiable or excusable, the verdict should have been for him. *Hinchliffe's case, supra*, 1 Wag. Stat., §§ 4, 5, 6, p. 446. It can scarcely be doubted that if the defendant had been tried for the homicide he should have been acquitted. If he should have been acquitted in such a case, then certainly in this the finding should have been in his favor.

In *Pond v. People*, 8 Mich. 150, a very well considered case, where the accused was tried for murder and found guilty of manslaughter, the death having occurred from a gun-shot wound, at the out-house of the prisoner where his servants slept, near his dwelling, and it was insisted that he was only charged with excusable or justifiable homicide, CAMPBELL, J., remarked: "The first inquiry necessary is one which applies equally to all grounds of defense; and is whether the necessity for taking life, in order to excuse or justify the slayer, must be one arising out of actual or imminent danger; or whether he may act upon a belief, arising from appearances which

give him reasonable cause for it, that the danger is actual and imminent, although he may turn out to be mistaken. Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion. But the rules which make it excusable or justifiable to destroy it under some circumstances are really meant to insure its general protection. They are designed to prevent reckless and wicked men from assailing peaceable members of society, by exposing them to the danger of fatal resistance at the hands of those whom they wantonly attack and put in peril or fear of great injury or death ; and such rules, in order to be of any value, must be in some reasonable degree accommodated to human character and necessity. They should not be allowed to entrap or mislead those whose misfortunes compel a resort to them. Were a man charged with crime to be held to a knowledge of the facts precisely as they are, there could be few cases in which the most innocent intention or honest zeal could justify or excuse homicide. * * The prisoner who is to justify himself can hardly be expected to be entirely cool in a deadly affray, or in all cases to have great courage or large intellect ; and he cannot well see the true meaning of all that occurs at the time ; while he can know nothing whatever * * concerning the designs of his assailant any more than can be inferred from appearances." These views are remarkably well expressed, and as I think, they are fully applicable to the undisputed facts in the present case I have only to reiterate my before announced conclusion, that the case should never have been submitted to the jury, except with a direction to return a verdict for the defendant.

Making the concession, however, that the case ought to have been submitted to the jury for consideration in the usual way, still the judgment should be reversed for errors otherwise committed in instructing the jury. There was error in the first instruction for plaintiff, because there was absolutely no evidence showing aggravating circumstances, nor that the blow "was wantonly and cruelly inflicted in a spirit of hatred or ill-will, and without reasonable provocation." If there were no aggravating circumstances attending the death, then exemplary damages were not allowable. *Cooley on Torts*, 44, and cases cited ; *Whalen v. Centenary Church*, 62 Mo. 326 ; *Owen v. Brockschmidt*, 54 id. 285. In the case last cited, it was held that where there were aggravating circumstances, the jury should not be restricted to a mere question of dollars and cents.

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The obvious corollary from the adjudication in that case is, that where there are no aggravating circumstances, the jury should be restricted to the pecuniary or "necessary injury resulting from such death."

The second instruction for plaintiff was erroneous in that it held the defendant responsible, whether the blow or the fall, or both combined, caused Morgan's death. Defendant's act, if it was not a wanton, but a lawful one, that of resisting the force and violence of a hostile intruder, directed both against the person and possession of defendant, rendered him only responsible for the natural and probable consequences of his act; and not answerable for any unforeseen and unfortunate result which may have attended that act. *Hinchcliffe's case, supra*; *Railway Co. v. Kellogg*, 94 U. S. 469. Worded as the instruction was, the jury may well have concluded that though defendant was not guilty of any wanton wrong in giving the blow, yet that he was responsible therefor, unless entirely justifiable in inflicting it, whether the blow was or was not the direct or proximate cause of Morgan's death. Upon a like theory defendant would have been civilly liable had he given the blow with his open and unarmed hand. It should have been left to the jury to say whether the death of Morgan was accidental, or the natural consequence of the blow inflicted.

The third instruction for the plaintiff was erroneous, because, while recognizing the right of defendant to use a deadly weapon in defense of his person against threatened danger of great personal injury, even to the extent of taking the life of his assailant, it utterly ignored and failed to give recognition to an equal right of defendant to do the same thing in defense of his office, which *pro hac vice* was as much his dwelling as the house ordinarily known by that appellation. And this right of defending one's dwelling is in some sense superior to that of the defense of his person; for in the latter case it is frequently the duty of the assaulted to flee, if the fierceness of the assault will permit, while in the former a man assaulted in his dwelling is not obliged to retreat, but may stand his ground, defend his possession, and use such means as are absolutely necessary to repel the assailant from his house, even to the taking of life. *Pond v. People, supra*, and cases cited; 3 Greenl. Ev., §§ 65, 117; *State v. Patterson*, 45 Vt. 308; s. c., 12 Am. Rep. 200; *Parsons v. Brown*, 15 Barb. 590.

And the instruction was also erroneous on another score. It

told the jury if there was reasonable ground to apprehend great personal injury from the deceased, "and the defendant struck him with the seal to avoid such injury, and not in a spirit of malice or revenge, he was justifiable." It will be observed that the term "malice" is not defined; the jury were therefore left to construe it as they would. It is a legal term, and "understood to mean that general malignity and recklessness of the lives and personal safety of others which proceed from a heart void of a just sense of social duty and fatally bent on mischief." 3 Greenl. Ev., § 144. It would seem from the instruction that malice was regarded as the legal equivalent of revenge. This was an evident error; and even if properly regarded as meaning revenge, the instruction was erroneous as not having a particle of evidence to support it.

It is unnecessary to examine *in extenso* the instructions asked by defendant, since we have incidentally reviewed most of those asked by him. The seventh instruction, however, asked on his behalf was properly refused; for it told the jury that if Pressley G. Morgan could not, had he lived, have recovered against defendant, then plaintiff could not do so. This, though true as a matter of law, had nothing to do with the case so far as concerned the jury.

As above indicated, the statute, under which this action was brought, authorizes, where there are circumstances of aggravation, the recovery of vindictive, exemplary or punitive damages; and when such recovery is allowable, the pecuniary standing of defendant is an obviously proper subject of inquiry. But as there were no aggravating circumstances in this case, and consequently no vindictive damages recoverable, the opulence or poverty of defendant was not properly admitted in evidence.

Judgment reversed and cause remanded.

Judgment reversed.

HENRY J., concurs on the first point discussed; NORTON, J., concurs in the result; NAPTON and HOUGH, JJ., dissent.

Stillwell v. Aaron.

STILLWELL V. AARON.

(60 Mo. 539.)

Surety — discharge of, by extension of time of payment in consideration of usurious interest in advance.

An agreement between indorsee and principal maker of a note, to extend the time of payment for a definite period, in consideration of usurious interest paid in advance, discharges a surety on the note, who was known to the indorsee so to be when he took the note.

ACTION on a note. The opinion states the facts. The defendant had judgment.

Waters & Winslow, with *W. P. Harrison*, for appellant. The consideration paid for the extension of time was interest in advance, and so, although usurious, it will not support the agreement. *Rucker v. Robinson*, 38 Mo. 158; *Hosea v. Rowley*, 57 id. 357; *Bank v. Harrison*, id. 503; *Byles on Bills*, 390; *Pars. Mer. Law*, 69, 93.

W. H. Hatch, and *James Carr*, for respondent.

HENRY, J. This was a suit on a note for \$2,000, executed by *Blaine & Steers*, and the defendant, *John Aaron*, dated February 18, 1873, payable 180 days after its date to *William Steers*, and by him indorsed to the plaintiff. The note was given for money borrowed by *Blaine & Steers* of *Stillwell*; the defendant, *Aaron*, was but the surety of the firm, and this was known to *Stillwell* when he received it. The evidence, on the part of the defendant, tended to show that when the note became due *Blaine & Steers* paid thereon \$1,000, and that in consideration of \$10, then paid to *Stillwell*, he agreed with *William Steers*, one of the firm of *Blaine & Steers*, and the payee and indorser of the note, to extend the time for payment of the balance one month, and that *John Aaron* was neither apprised of, nor consented to, the extension. For plaintiff, the court instructed the jury as follows: "Although the jury may believe from the evidence that *Blaine & Steers* were the principal debtors on the note, and that *Aaron* was only the security thereon, and that at maturity of said note *Stillwell* was the holder of said note, and as such he did,

in consideration of \$10 paid him by Steers, one of the firm of Blaine & Steers, agree with Steers to extend the time for payment of said note, for a definite time, without the consent of Aaron ; yet if they find from the evidence that said \$10, paid by Steers, was paid as interest in advance on said note, for said time, to procure said extension, and was so accepted and received by Stillwell, then the agreement so made by Stillwell did not discharge said Aaron, and the verdict should be for plaintiff." In another instruction the court declared that if, at the time of payment of the \$1,000, it was agreed by plaintiff, and Blaine & Steers, in consideration of \$10, then paid by Steers to plaintiff, that the latter should extend the time of payment on the balance due for thirty or sixty days, such agreement did, by operation of law, release defendant from all liability on said note. There was a verdict and judgment for defendant, from which judgment plaintiff has prosecuted an appeal to this court. Many instructions were given and refused, but the foregoing fully present the questions which it is deemed necessary to consider.

It has uniformly been held in this State, that if a creditor, for a valuable consideration, make an agreement with the principal debtor which suspends his right of action on the demand for a definite period of time, without the consent of the surety, it operates to discharge the surety. *Globe Mut. Ins Co. v. Carson*, 31 Mo. 218; *Smarr v. Schnitter*, 38 id. 480; *German Sav. Asso. v. Helmrick*, 57 id. 100, 385; *Coster v. Mesner*, 58 id. 550; *Kincaid v. Yates*, 63 id. 46; *First Nat. Bank of Springfield v. Leavitt*, 65 id. 562; *State v. Roberts*, 68 id. 234. The doctrine is stated by SAVAGE, C. J., in *Wood v. Jefferson County Bank*, 9 Cow. 206, as follows: "If the creditor, by agreement with the principal debtor, without the consent of the surety, varies the terms (of the contract) by enlarging the time of performance, the surety is discharged." In *Kincaid v. Yates*, 63 Mo. 47, it is thus stated: "If the creditor enters into any binding contract, the effect of which will be to give further time to the principal debtor without the consent of the surety, the surety will be discharged." The contract or agreement which the authors of the above extracts had in their minds was not an alteration of the original contract by erasure of terms from it, or the addition of stipulations to the original contract by interlineation. This would release the surety without any reference to the principle under consideration, whether such interlineation or erasure were

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made for a valuable consideration or not. It would then not be the contract the surety signed, and he could safely plead *non est factum*, or prove the fact under the general issue, if sued on a contract not under seal.

An agreement to extend the time will discharge the surety, whether the agreement is indorsed upon the obligation, or be evidenced by erasure or interlineation or by a collateral agreement. The adjudicated cases which support this proposition are innumerable, and nearly all, if not all, that will be subsequently cited in this opinion fully sustain it. Familiar principles of elementary law, we think, may also be safely invoked in its support. "In cases of a simple contract in writing, oral evidence is admissible to show that by a subsequent agreement the time of performance was enlarged, or the place of performance changed." 1 Greenl. Ev., § 304. "Neither is the rule (that extrinsic evidence is not admissible to contradict or alter a written instrument) infringed by the admission of oral evidence to prove a new and distinct agreement upon a new consideration, whether it be as a substitute for the old or in addition to and beyond it." Id., § 303. The agreement, when made, becomes a part of the original, and just as effectually prevents the creditor from suing before the lapse of time agreed upon as if it were evidenced upon the original contract by erasure or interpolation. The doctrine is broadly stated in Theobald on Principal and Surety, that "the surety is discharged, if, without his consent, the principal parties make a new agreement inconsistent with the terms of the original agreement, or if they agree to make any alteration either in the terms of the original agreement or in the mode of performing them." In *Rucker v. Robinson*, 38 Mo. 158, the court said: "It is well settled that a covenant not to sue upon a claim cannot be pleaded to, and presents no bar to an action on the claim, the only remedy of the covenantee being a suit for damages on the covenant or agreement." We can understand why a covenant not to sue, whether for a definite or indefinite time, might be held not to discharge the surety, although the contrary is held by some courts of the highest respectability. *Wright v. Bartlett*, 43 N. H. 548; *Deal v. Cochran*, 66 N. C. 270. A covenant not to sue is not necessarily an agreement to extend the time for payment. The debtor or his surety, notwithstanding a covenant not to sue the principal debtor, could, if he desired, pay the demand before the expiration of the time named in the covenant, and the creditor

would be compelled to receive it. Such a covenant neither modifies the original agreement nor changes its terms, but leaves that contract in full force, and does not suspend the right of action upon it. Not so, however, as to an agreement upon sufficient consideration to change the time of payment or performance, or any other of the terms of a contract. The contract, when it has been so modified, is at an end, and the terms of the new agreement become substitutes for so much and a part of the original contract. Greenl. Ev., *supra*.

The evidence in this case tended to prove an express agreement, in consideration of \$10 paid to the creditor, for an extension of the time for payment of the balance of the note. If it was legal interest in advance, the payment thereof was a sufficient consideration to support the express promise. "In the first place, as to considerations arising from benefit or injury. The principal requisite, and that which is the essence of every consideration, is that it should create some benefit to the party promising, or some trouble, prejudice or inconvenience to the party to whom the promise is made. Wherever, therefore, any injury to the one party, or any benefit to the other party, springs from a consideration, it is sufficient to support a contract. Story on Cont., § 548. "Every party to a contract may ordinarily exercise his own discretion as to the adequacy of the consideration, and if the agreement be made *bona fide*, it matters not how insignificant the benefit may apparently be to the promisor, or how slight the inconvenience or damage appear to the promisee, provided it be susceptible of any legal estimation." *Id*.

That interest paid in advance is a sufficient consideration to support a contract for the extension of the time of payment of a note, or other money demand, is fully sustained by the following cases: *Smarr v. Schnitter*, 38 Mo. 479; *Lime Rock Bank v. Mallett*, 34 Me. 547; *Bank v. Woodward*, 5 N. H. 99; *Wright v. Bartlett*, 43 id. 548; *Montague v. Mitchell*, 28 Ill. 485; *Kennedy v. Evans*, 31 id. 258; *Myers v. First National Bank*, 78 id. 258; *Cross v. Wood*, 30 Ind. 378; *White v. Whitney*, 51 id. 124; *Vilas v. Jones*, 10 Paige 76; *Miller v. McCan*, 7 id. 451; *Kenningham v. Bedford*, 1 B. Monr. 325; *Austin v. Dorwin*, 21 Vt. 38; 72 Ill. 301; 2 N. H. 333; 6 id. 504. In most of the above cases it was held that payment of usurious interest is a sufficient consideration for the promise to extend the time of payment. We are aware that the contrary was held in *Wiley v. Hight*, 39 Mo. 132, and in *Farmers &*

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Traders' Bank v. Harrison, 57 Mo. 506; but the case principally relied upon to support the ruling was *Marks v. Bank of Mo.*, 8 Mo. 318, in which Judge SCOTT expressly stated, as the ground of that decision, "that the usurious interest might have been recovered back the next moment after it was paid." Such is not the law at present in this State. *Ransom v. Hays*, 39 Mo. 445; *Rutherford v. Williams*, 42 id. 18. If usurious interest be paid, it cannot be recovered back, and if one make an agreement to extend the time of payment of a note, or other money demand in consideration of usury paid, the agreement is binding upon him. If the consideration be a promise to pay usury, as this promise could not be enforced, and would not sustain an action, the contract would not bind the other party. The distinction is between executed and executory contracts. In *Fawcett v. Freshwater*, 31 Ohio St. 637, an agreement in consideration of the same rate of interest named in the note, for extension of time of payment, without payment of interest in advance, if made without the knowledge of the sureties, was held to discharge the sureties.

It is contended by the appellant's counsel, that defendant, having executed the note as a maker, stands as a principal debtor after indorsement, and the indorser as a surety. This might be true if the paper were negotiated in the ordinary course of business. If Stillwell had purchased the note of the payee, even with knowledge that Aaron had executed it for accommodation, he, under the cases cited by counsel, would have had the right to treat him as a principal, and Steers, the indorser, as his surety, throughout. The cases cited fully sustain that view. But here there was a borrowing of money. It was pre-arranged by Stillwell, and Blaine & Steers, who borrowed the money, that the latter should procure the name of some other person to the note as surety. It was in no sense the case of a note negotiated in the ordinary course of business, or rather of a note bought by Stillwell of the payee. It was of such a note that it was said, in the *Bank of Montgomery v. Walker*, 9 S. & R. 238, that: "When the note was indorsed, it passed into the defendant's hands as a business note, it was drawn in that form, it was negotiated in that form, it assumed that shape to serve the purpose of Walker & George." There Walker & George, the payees, were the principal debtors, and the maker had executed the note for their accommodation. That case is distinguishable from this in the fact that there the note was executed by

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the maker under circumstances which indicated that he intended to be held as the principal debtor. In *Laxton v. Peat*, 2 Campb. 185, the doctrine was announced by Lord MANSFIELD, that: "If the indorsee of a bill of exchange, having notice that it was accepted without consideration, receive part payment from the drawer, and give time to pay the residue, he thereby discharges the acceptor." But this was afterward denied in *Kerrison v. Cook*, 3 Campb. 362, by GIBBS, J., and also in *Ex parte Wilson*, 11 Ves. 410; also in *Fentum v. Pocock*, 5 Taunt. 192. We think it will be found that the recent American cases do not hold the strict doctrine announced in the English cases, which repudiate that held by Lord MANSFIELD, in *Laxton v. Peat*. Regard is paid to the substance of the transaction, and the agreement of the parties express or implied. If one who is but surety execute a note as maker, or accept a bill intending to be held as principal, and the security is so taken by the indorsee, he may be treated in the character he has assumed on the face of the transaction, notwithstanding the holder, when he received the security, was aware that the maker, or acceptor, had become so for the accommodation of the drawer of the bill or indorser of the note. This proposition the authorities fully sustain.

The *German Savings Association v. Helmrick*, 57 Mo. 101, was a case like the present. The note was executed by Helmrick & Co. and Jas. M. Ward, payable to Helmrick & Co., who assigned it to the German Savings Association. Ward executed the note for the accommodation of Helmrick & Co., and the court decided that Ward was released in consequence of a binding agreement for extension of the time of payment between the holder and Helmrick & Co. In the case at bar the court erred in its instruction, not to the prejudice of plaintiff, however, but against the defendant. The cases of *Hosea v. Rowley*, 57 Mo. 357, and the *German Savings Association v. Helmrick*, id. 101, seem to have been misunderstood by the court below. The opinions in those cases do not really assert a doctrine different from that here announced. The judgment is affirmed.

Judgment affirmed.

All concur.

C A S E S
IN THE
SUPREME COURT
OF
NEVADA.

BLAISDELL V. STEPHENS.

(14 Nev. 17.)

Trespass — joint liability.

In an action of trespass against two or more acting independently, and producing a result injurious to the plaintiff, one cannot be held for the acts of the others. (*See note, p. 526.*)

ACTION of damages for flowing land. The opinion states the case. The plaintiff had judgment below.

R. M. Clarke, for appellants.

Thomas E. Haydon and Boardman & Varian, for respondents.

HAWLEY, J. The plaintiffs, as owners of a drain ditch constructed in 1876, brought this action to recover damages against defendants for wrongfully flowing waste water from their lands to the injury of plaintiffs' ditch, and for an injunction to restrain such wrongful flowing of waste water. At the close of plaintiffs' testimony the defendants moved for a nonsuit upon the ground, among others, that it did not appear that the injury complained of "was the result of the joint or concurrent act of the defendants." This motion was overruled. The cause was tried before a jury to whom

special issues were submitted. The jury answered the special issues, and also found a general verdict in favor of the plaintiffs, assessing the damages at fifty dollars. Both parties moved for judgment upon the special issues found by the jury. The court gave judgment in favor of the plaintiffs, and the defendants appeal.

From the issues found by the jury it appears that the "waste water from the defendants' land and irrigating ditches" did flow into plaintiffs' drain ditch, and that the waste water from the lands and irrigated ditches of Henry Weston and Mary Wall also flowed into plaintiffs' drain ditch. The waste water from the lands and ditches of the defendants has flowed upon the land drained and intersection by the drain ditch of plaintiffs ever since 1864. With the exception of the 8th day of May, 1877, no more waste or drainage water flowed from the lands and ditches of the defendants than in previous years. The defendants "own, occupy and irrigate separate and distinct tracts or parcels of land each in his own right." They have no drain ditch which they use together in common. The defendant Sessions in 1876 constructed a drain ditch leading from his land to the Truckee river of sufficient capacity to carry, and it did carry, all the waste water brought or used by him on his land with the exception of the 8th day of May, 1877.

The jury failed to find whether the defendants, or either of them, used any more water upon their land than was proper and necessary to irrigate the same, but did find that each defendant used proper and reasonable methods of irrigation. The plaintiff Henry Stephens had dams across the slough or channel, in which waste or surplus water from the lands of defendants flowed, and turned the water out upon his lands to irrigate the same. The grantors of the plaintiff Henry Stephens appropriated, claimed and used the waste water flowing from the lands of defendants for irrigating purposes. The plaintiff Pine, upon the land of the plaintiff Blaisdell, used the waste or surplus water flowing from the lands of Henry Stephens, for irrigating purposes. The waste water flowing from the lands of defendants flowed upon the lands of the plaintiff Henry Stephens, in a natural channel or slough, and he turned the water out of said channel upon his land. The waste water flowing from the lands of defendants, after passing over the lands of the plaintiff Henry Stephens, flowed into an artificial ditch constructed upon the lands of the plaintiff Blaisdell, and thence into the drain

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ditch of the plaintiffs. The plaintiffs' ditch was damaged to the extent of seventy-five dollars.

The jury did not know how much it was damaged by the water flowing from the lands of Mary Wall and Henry Weston, but found that it was damaged fifty dollars by the water flowing from the lands of defendants and twenty-five dollars by the "waste water flowing from plaintiffs' lands."

It does not appear from the evidence that the defendants acted in concert, or that the act of either in any manner produced the act of the other. We are of opinion that the motion for a nonsuit ought to have been sustained. The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other. *Ferguson v. Terry*, 1 B. Monr. 96; *Partenheimer v. Van Order*, 20 Barb. 479; *Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Bard & Wenrich v. Yohn*, 26 Penn. St. 482; *Little Schuylkill Navigation Railroad and Coal Company v. Richards*, 57 id. 142.

The case last cited is certainly analogous to the case at bar. There the suit was brought for damages to a dam filled by deposits of coal dirt from different mines on the stream above the dam, and the plaintiffs ought to hold the defendant liable for the whole damages caused by the deposits. Speaking of the results that would follow if the defendant was held liable for the acts of others, the Supreme Court say: "It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If instead of coal dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream — this is the tort, while the deposit below is only a consequence. The liability therefore began above with the defendant's act upon his own land, and

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this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterward became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions." In this case, the right of action arises, if at all, upon the act of allowing the waste water to run into the slough from the land of the defendants. This is the tort. The damage to the drain ditch below is only a consequence. The act of defendant Sessions, in allowing the waste water to run from his land, was separate and independent from the act of defendant Stephens, in allowing the waste water to run from his land, and neither of them could be held liable in damages for the wrongful acts of the other.

The judgment of the District Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

On petition for rehearing, same judgment, HAWLEY, J.

NOTE BY THE REPORTER.—To the same effect, *Chipman v. Palmer*, *post*. In *Keyes v. Little York Mining and Water Co.*, California Supreme Court, Nov. 17, 1879, 21 Alb. L. J. 49, a number of miners, each carrying on business independently, deposited debris known as "tailings" in a river which ran through plaintiff's land below the mines, which "tailings" was deposited by the river, upon plaintiff's land, to its injury, and the miners severally threatened to continue depositing such tailings. Each miner, in all this, acted for himself and not in collusion or combination with any other. *Held*, that an action to restrain such acts being done and threatened, in which the miners were joined as defendants, could not be sustained.

STATE V. CLIFFORD.

(14 Nov. 72.)

Criminal law — larceny — lost property.

If one finds lost property, and knows the owner, or there are marks on the property by which he can ascertain the owner, and he converts the property to his own use, intending at the time of finding so to convert it, he is guilty of larceny, but not so if that intention is not formed until afterward.*

*To same effect, *Griggs v. State* (58 Ala. 425), 29 Am. Rep. 702, and note, 708. See note, 30 Am. Rep. 180.

CONVICTION of larceny of a bar of bullion from a stage-coach. The bar was, with four others, separately sacked and numbered, the one in question being number 8, and all the sacks were plainly marked with the name of the consignor, and had express tags on them. The express company offered a reward of \$250 for the recovery of the bar, and the defendant stated to the agent that he thought he could find it, but as he was acting as a go-between, and should have to pay the reward to the parties from whom he got his information, he should want \$150 more for his own services. This was agreed to, the express company reserving the right to prosecute any party in whose possession the bar should be found. The defendant, in company with three others, started at 1 o'clock A. M., to find the bar, and at his suggestion they provided themselves with shovels to dig up the bar. He pointed out a spot, where on digging they found the bar. Subsequently the officers found the handle of sack number 8 in a privy vault in the premises of defendant.

Robert M. Clark and *N. Soderberg*, for appellant. The court erroneously charged the jury that if the defendant, at the time of finding the bullion, or at any time thereafter, knew the owner thereof, and feloniously appropriated and converted it to his own use, then he was as guilty of larceny as though he had originally stolen it. *People v. Cogdell*, 1 Hill, 94; *People v. Anderson*, 14 Johns. 294; 7 Am. Dec. 462; *Wright v. State*, 5 Yerg. 154; *State v. England*, 8 Jones (N. C.) 399; 2 Bish. Cr. Law, § 759, n. 17; 837, 838, 876, 880, 883; 1 id., § 207.

The court erred in charging the jury that if the defendant was not the finder, but some other person found the bullion, and if then or afterward he and defendant knew who the owner of the bullion was, etc., and feloniously appropriated it, etc., they should convict defendant. *Wilson v. People*, 39 N. Y. 459; 18 Mo. 329; 1 Hill, 94; 14 Johns. 294.

The court erred in instructing the jury that "the only cases in which a party finding the property of another can be justified in appropriating it to his own use are where it may be fairly said the owner has abandoned it or where the owner cannot be found." 1 Hill, 94; 14 Johns. 294; *State v. Conway*, 18 Mo. 321; Archbold's Cr. Pl. 119; *Rex v. Leigh*, 2 East's P. C. 694; *Lane v. People*, 5 Gilm. 305; *State v. Gresser*, 19 Mo. 247.

IV. The possession of recently stolen property unexplained is not, *per se*, *prima facie* evidence that the possessor is guilty of larceny. *People v. Chambers*, 18 Cal. 383 ; *People v. Ah Ki*, 20 id. 180 ; *People v. Gassaway*, 23 id. 51 ; *People v. Antonio*, 27 id. 407 ; 3 Greenl. Ev., § 31 ; *State v. I. En*, 10 Nev. 277.

John R. Kittrell, attorney-general, and *T. W. Healey*, for respondent. I. The court did not err in any of its instructions as to the facts necessary to justify a conviction of the finder of lost property of the crime of larceny. 2 Russ. on Crimes, 12, 13, 14, 16 ; *State v. Weston*, 9 Conn. 527 ; *Lane v. Peopie*, 5 Gilm. 305 ; *People v. McGarren*, 17 Wend. 460 ; *State v. McCann*, 19 Mo. 249 ; *Reg. v. West*, 29 Eng. L. & E. 525 ; *Ransom v. State*, 22 Conn. 160 ; *Reg. v. Thurborn*, 2 C. & K. 832 ; *Reg. v. Moore*, L. & C. 1 ; 2 Whart. Cr. Law, 1792, 1795, 1801 ; 2 Bish. Cr. Law, §§ 880, 886 ; 2 Arch. Cr. Pr. & P. 1235, 1236, 1242 ; *People v. Anderson*, 14 Johns. 294 ; 7 Am. Dec. 462 ; *Porter v. State*, M. & Y. 555 ; *Baker v. State*, 29 Ohio St. 184 ; s. c., 23 Am. Rep. 731 ; *People v. Cogdell*, 1 Hill, 94 ; *State v. Pratt*, 20 Iowa, 267 ; *Reg. v. Mole*, 1 C. & K. 417 ; *State v. Ferguson*, 2 McMullen, 502 ; *Booth v. Commonwealth*, 4 Gratt. 525.

HAWLEY, J. Appellant questions the correctness of several instructions given by the court as to the facts necessary to justify a conviction of the finder of lost property of the crime of larceny. The rules of law relating to this subject and applicable to the facts of this case, as gleaned from the authorities, which are very numerous, may be stated in general terms as follows: When property is found in the highway, and the finder knows the owner, or there be any mark upon it by which the owner may be ascertained, and the finder, instead of restoring it, converts it to his own use, such conversion will constitute a felonious taking. If there be no notice of the owner at the time of the finding, yet if there be a felonious intention to appropriate the property, coupled with a reasonable belief that the owner could be found, it would be larceny. But the finder of lost property who takes possession of it, not intending to steal it at the time of the original taking, is not rendered guilty of larceny by any subsequent felonious intention to convert it to his own use. *People v. McGarren*, 17 Wend. 460 ; *Wilson v. People*, 39 N. Y. 461 ; *State v. Weston*, 9 Conn.

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526 ; *Ransom v. State*, 22 id. 153 ; *Baker v. State*, 29 Ohio St. 184 ; s. c., 23 Am. Rep. 731 ; *Bailey v. State*, 52 Ind. 462 ; s. c., 21 Am. Rep. 182 ; *Wolffington v. State*, 53 id. 343 ; *Commonwealth v. Titus*, 116 Mass. 42 ; s. c., 17 Am. Rep. 138 ; *Reg. v. Thurborn*, 2 Car. & Kir. 832 ; *Reg. v. Moore*, 8 Cox's C. C. 416 ; 2 Bish. Cr. Law, § 882, and other authorities there cited ; 2 Whart. Cr. Law, § 1800.

All portions of the charge of the court or instructions given to the jury at variance with these rules are erroneous, especially those portions which convey an intimation to the jury that any subsequent felonious intention of defendant to convert the property to his own use is sufficient to authorize a conviction.

The court also erred in refusing to give the sixth instruction asked by defendant.

When property recently stolen is found in the possession of a person accused of the theft the accused person is bound to explain the possession in order to remove its effect as a circumstance indicative of guilt. *State v. I. En.*, 10 Nev. 279. But if there is no other evidence tending to establish the guilt of the defendant, and the jury are satisfied that he gives a reasonable account of his possession of the property, then it would be their duty to acquit.

Appellant claims that the evidence, under any theory of the prosecution, is insufficient to support a conviction of larceny ; that if the defendant is guilty of any offense it could only be that of receiving stolen goods. In our opinion there is ample testimony tending to show that the defendant was guilty of the offense of grand larceny, either in stealing the bar of bullion from the stage or finding it upon the highway, knowing the owner, or, it having marks upon it by which the owner might readily be ascertained, intending at the time to convert it to his own use. If the jury believed the testimony given by the defendant, in his own behalf, to be true, he was not guilty of larceny or any other offense (unless it be that of compounding a felony).

The judgment of the District Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

STATE V. AH CHUEY.

(14 Nev. 79.)

Criminal law — compelling prisoner to expose his person for identification.

In a criminal case on a question of personal identity, a witness testified that the defendant had certain tattoo marks on his person. The court, compelled the defendant, against his objection, to exhibit his person to the jury *Held*, no error. (*See note, p. 540.*)

CONVICTION of homicide. The opinion states the case.

Robert M. Clarke and *N. Soderberg*, for appellant. The court erred in compelling defendant to exhibit the tattoo mark on his arm to the jury. This was compelling him to testify against himself. Const. of Nevada, § 8, 18; Comp. Laws, §§ 2305, 2306; U. S. Dig., 1st series, vol. XIV., p. 693, §§ 4630, 4643, 4659; Cooley's Const. Lim. (1868), 305; *State v. Jacobs*, 5 Jones (N. C.), L. 259; *Rex v. Worsenham*, 1 Ld. Raym. 705; *Reg. v. Mead*, 2 id. 927; *Rex v. Shelly*, 3 T. R. 142; 1 Greenl. Ev., § 451; Whart. Cr. L., § 807; 2 Phillips' Ev. 929; *Stokes v. State*, 5 Baxt. 619; s. c., 30 Am. Rep. 72; 36 Cal. 529; *Com. v. Scott*, 123 Mass. 222; s. c., 25 Am. Rep. 81.

Wm. Cain, district attorney of Washoe county, for respondent.

HAWLEY, J. The Constitution of this State declares that no person shall be compelled, "in any criminal case, to be a witness against himself." Art. 1, § 8.

On the trial of this case the court compelled the defendant, against his objection, to exhibit his arm so as to show certain tattoo marks thereon to the jury (a witness having previously testified that such marks were upon the defendant's arm). Was this compelling the defendant to be a witness against himself? What is meant by the constitutional clause above referred to? Perhaps the best way of answering these questions would be to state the history which led to the adoption of this constitutional provision. A similar provision is found in the Constitution of nearly every State of the union and in the Constitution of the United States.

In the early history of England accused persons were compelled to testify in answer to any criminal charge brought against them. With the advancing spirit of the age it was claimed that no man ought to be compelled to accuse himself of any crime, and by degrees the rule was changed to its present state in accordance with what seemed to be the public sentiment of the country. Story, in his Commentaries on the Constitution of the United States, says, that the insertion of this clause "is but an affirmance of the common law privilege." It was, according to his views, adopted to prevent the evils which had resulted from the custom of other countries in compelling criminals to give evidence against themselves and of being "subjected to the rack or torture in order to procure a confession of guilt." 2 Story on Const. 1788.

Blackstone claims that the trial by torture was unknown to the law of England. In referring to this custom he says: "It seems astonishing that this usage of administering the torture should be said to arise from a tenderness to the lives of men; and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nations, viz., because the laws cannot endure that any man should die upon the evidence of a false or even a single witness, and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession, thus rating a man's virtue by the hardness of his constitution, and his guilt by the sensibility of his nerves." 4 Black. Com. 326. This learned commentator, in order to fully expose the fallacy of this reason, quotes with approval the language of Tully, that notwithstanding pain governs those tortures, the quæstor rules and regulates as well the mind as the body of every one; desire inclines; hope bribes; care enfeebles; so that in such a distressed state of things no room is left for the truth. It does indeed seem strange, at this day, that a people as intelligent and enlightened as the Romans were did not earlier discover the utter futility of this mode of punishment to extract the truth. It may be, however, that the wisdom of future ages will discover and bring to light the errors of the system which we have adopted in the United States, in order to accomplish that very useful purpose. It has already been assailed by James Fitzjames Stephens, and other prominent and able writers on the criminal law.

I have referred to this subject, not for the purpose of pointing out or expressing any opinion upon the merits or demerits of any

particular system, but to show as a fact that in all countries and in all ages, whatever the law or custom may have been, it was always claimed as a reason for its adoption that it was calculated to discover the truth, and thereby promote the ends of justice. Such is claimed to be the rule of our Constitution and laws upon this question.

The object of every criminal trial is to ascertain the truth. The Constitution prohibits the State from compelling a defendant to be a witness against himself because it was believed that he might, by the flattery of hope or suspicion of fear, be induced to tell a falsehood.

None of the many reasons urged against the rack or torture or against the rule compelling a man "to be a witness against himself" can be urged against the act of compelling a defendant, upon a criminal trial, to bare his arm in the presence of the jury so as to enable them to discover whether or not a certain mark could be seen imprinted thereon. Such an examination could not, in the very nature of things, lead to a falsehood. In fact, its only object is to discover the truth; and it would be a sad commentary upon the wisdom of the framers of our Constitution to say that by the adoption of such a clause they have effectually closed the door of investigation tending to establish the truth.

Confessions of persons accused of crime, whenever obtained by the influence of hope or fear, are excluded because in considering the motives which actuate the mind of man they might be induced to make a false statement. Yet notwithstanding the universality of this rule of law, whenever the confession, however improperly or illegally obtained, has led to the discovery of any given fact, that fact is always admitted in evidence, because the reasons which would have excluded the confession no longer exist. This is the governing and controlling principle of the law.

The Constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is to testify against himself. To use the common phrase, it "closes the mouth" of the prisoner. A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation or make any statement for the purpose of proving or disproving any question at issue before any tribunal, court, judge or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for

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the purpose of evading the truth, but as before stated, for the reason that in the sound judgment of the men who framed the Constitution it was thought that owing to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true.

State v. Jacobs, 5 Jones, 259, and *Stokes v. State*, 5 Baxt. 619 ; s. c., 30 Am. Rep. 72, have been cited and are relied upon to sustain the position that the act of compelling Ah Chuey to bare his arm was in violation of his constitutional rights.

In the *Jacobs* case the court decided that "a judge has not the right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his status as a free negro." This decision was based upon two grounds : First, upon the general rule that a witness could not be compelled to furnish any evidence that would tend to criminate himself. Second, that the manner in which the defendant was compelled to exhibit himself was prejudicial to the defendant. I do not propose to deny the correctness of that decision, but I do insist that it cannot be sustained upon the first ground stated therein.

In the subsequent case of *State v. Johnson*, 67 N. C. 58, the court, in my opinion, declare the correct principle that governed the *Jacobs* case and distinguished it from the one then under consideration, viz.: In the *Jacobs* case the defendant was compelled to exhibit himself to the jury so that the "jury might determine by inspection his quality and condition — his blood or race." That was a matter to be proved by the oath of witnesses who knew the facts, or it may be by experts.

It is a noticeable fact that in none of the subsequent cases in that State, where the *Jacobs* case was cited, have the courts sanctioned or in any manner approved of the first reasoning upon which the decision was based. Whilst they have taken especial pains to distinguish the facts in the respective cases, they have, without disturbing the decision, virtually refused to acknowledge the reasoning of the court as applicable to cases of a similar character.

In *State v. Woodruff*, 67 N. C. 89, where an issue of bastardy was being tried, the mother of the child, when examined as a witness, held the child in her arms, and the counsel in addressing the

jury called attention to its features and commented upon its resemblance to the defendant, the child being still in its mother's arms. This was held not to be error.

Now, how could the jury determine the resemblance, unless they also examined the features of the reputed father? Was he not compelled to furnish evidence against himself by exhibiting his face to the jury? Surely, if the Constitution protects a defendant, it could not possibly make any difference whether the defendant exhibited himself in sitting down or standing up; in allowing the jury to look at his features or the color of his hair; to look at a mark plainly visible upon his face or examine marks upon his person concealed by his ordinary clothing. Does he not furnish as much evidence against himself in the one case as the other? Looking then at the facts, and applying thereto the principles of common sense, did not Woodruff in the one case furnish more evidence against himself than Jacobs did in the other? If the broad mantle of this provision of the Constitution covers the one case, it certainly does the other. But the truth is, that the difference between the cases, as held by the respective courts, relates exclusively to the manner in which the defendant is compelled to exhibit himself, and is not in any way governed or controlled by the Constitution.

It was admitted in the oral argument that a jury might look at the features of the defendant and examine marks upon any part of his person not concealed by his ordinary clothing, so long as he was not compelled to exhibit himself to the jury, but it was very earnestly contended that the inspection could go no further; that the defendant, under the facts of this case, could not be compelled to draw up his shirt sleeve so as to exhibit the tattoo mark upon his wrist or forearm, because such an act was compelling the defendant to furnish evidence against himself, in violation of a provision of the Constitution.

From a constitutional standpoint, what does this argument amount to? If in order to establish the identity of any defendant in a criminal case, it became necessary to examine a peculiar mark on the back of his neck, the admissibility of such an examination would, under the rule contended for, depend solely upon the size and style of his shirt collar. If he wore a turn-down collar, the mark would be visible without removing any of his ordinary clothing, and could be examined by the jury; but if he insisted upon the most approved fashion and wore a standing collar, close fitting

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to the neck, the mark would be concealed by his ordinary clothing and could not be examined.

In another case the defendant's hair might be long enough to conceal any scar upon his neck; but if he had his hair cut before coming into court, the barber's shears—by clipping his curls—might destroy all protection given by the Constitution.

The style of dress which men and women wear is regulated, to some extent, by the custom and fashion of the community where they reside. The admissibility of evidence of this character would, under the sound reasoning and logical views of this rule, fluctuate and change by the peculiar whims, caprice, fashion, or frivolity of the particular community where the defendant is tried. If the defendant is a woman, and the custom is for her sex to go closely veiled whenever appearing in public, if her identity is questioned and made to depend to some extent upon the presence of a peculiar scar upon her cheek, she would, under the sanctity of the Constitution, be protected from removing her veil, and the jury would not be allowed to even examine the features of her face.

In *State v. Garrett*, 71 N. C. 85; s. c., 17 Am. Rep. 1, the defendant was indicted for murder. On the night of the homicide, defendant stated to the persons present that the deceased came to her death by her clothes accidentally catching fire while deceased was asleep, and that she (defendant), in attempting to put out the flames, "burnt one of her hands." At the coroner's inquest, the defendant was compelled to unwrap the hand she stated had been burnt and exhibit it to a physician there present, "and there was no indication of any burn whatever upon it."

Upon the trial of the case, "The court ruled that any thing the prisoner said at the inquest was inadmissible; but that the actual condition of her hand, although she was ordered by the coroner to unwrap it and exhibit to the doctor, was admissible as material evidence to contradict her statement to the witness on the night of the homicide." This ruling was sustained by the Supreme Court. How is it that the Constitution would not reach this case as well as the case of Jacobs? Is it because Jacobs was compelled to exhibit his head in court, whereas Garrett was only compelled to exhibit her hand to a physician at a coroner's inquest? Is the force of the constitutional provision limited to acts within the walls of a courtroom? Can it be possible that it has no application out of sight of the particular "temple of justice" where the case is tried?

Could a defendant be compelled against his objection to open his mouth and testify upon his preliminary examination before a committing magistrate? Would other witnesses who were present at such examination be allowed to detail upon the trial the testimony so given? Is there not a broad and substantial distinction between the testimony given by a defendant under oath, or statements made under a false promise or improper inducement, upon the one side, and evidence of physical facts obtained from such testimony, or in any other manner, on the other side?

If the Constitution was applicable to *Jacobs'* case, and protected him from being compelled to give evidence against himself by exhibiting his head to the jury, then it ought to have been applied to *Garrett's* case, and protected her from being compelled to give evidence against herself by exhibiting her hand to the physician at the coroner's inquest.

Take the case of Stokes. The prosecution sought to compel the defendant in the court-room to put his foot in a pan of mud, in order to identify the track thus made with a track found in mud of equal softness and similar character, made by a bare foot near the scene of the homicide. The court refused to compel the defendant "to put his foot in it." On appeal, the case was reversed because this circumstance might have had an influence on the jury prejudicial to the defendant.

It is argued that the act of the prosecution tended to compel the defendant to make evidence against himself. I am of opinion that too much importance has been attached and too much prominence given to the words "compelled to make evidence against himself." The defendant Stokes, if he was the guilty person, was making evidence against himself when he put his foot in the mud near the scene of the homicide, and when arrested he could have been compelled to put his foot in that track, against his will, and if his foot corresponded with the track, that fact would have been admissible upon the trial of his case. *State v. Graham*, 74 N. C. 646.

In a case of homicide the defendant makes evidence against himself by being compelled to surrender the weapon with which the offense was committed, for it can always be used as evidence against him. A burglar is compelled to give evidence against himself when he is forced to surrender false keys and other burglarious instruments found in his possession. A counterfeiter is compelled to

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give evidence against himself when the dies he had manufactured and used are discovered and brought into court for inspection.

The application of the principle sought to be enforced upon the reasoning of the court in *Jacobs'* case, as being within the protection of the Constitution, would, if logically carried out, apply to all these and many other similar cases.

From whatever standpoint this question can be considered, the truth forces itself upon my mind that no evidence of physical facts can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the Constitution. The question of whether or not the court erred in compelling the defendant Ah Chuey to exhibit his arm must, in my opinion, be determined upon other grounds. Was the defendant compelled to exhibit himself in such a manner as to unjustly or improperly prejudice his case before the jury? Did the act in question have a tendency to degrade, humiliate, insult or disgrace the defendant? Did the judge, by the act in question, convey to the jury the idea that he believed the defendant to be guilty of the offense charged against him? If either of these questions ought to be answered in the affirmative, then I think the defendant should be granted a new trial. A defendant in a criminal case is entitled to a fair and impartial trial, free from insult or obloquy, and courts cannot be too particular in guarding his personal rights and privileges. He should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever. The judge presiding at the trial should not express any opinion upon the facts (*State v. Tickel*, 13 Nev. 502, and the authorities there cited), or compel the defendant to do any act which would clearly convey to the jury an intimation that the defendant was guilty of the offense charged, or to exhibit himself in such a manner as to prejudice his case before the jury.

The guilt or innocence of the defendant is a question to be determined by the jury, free from any improper influence of any kind or character whatever. The cases of *State v. Jacobs* and *Stokes v. State* are authorities worthy of consideration upon this branch of this case. Every case, however, where these questions arise, must necessarily be decided upon its own peculiar facts and circumstances. It is not shown that there was any thing indecent or offensive in the mere exhibition of defendant's arm to the jury. It does not

appear to me that such an act would have a tendency to insult, degrade or humiliate the defendant.

After giving to all these questions unusual deliberation, my conclusion is that the act of the court in compelling the defendant to exhibit his arm did not tend, independent of the fact of the tattoo marks being found, to improperly influence or prejudice the defendant's case before the jury.

From time immemorial it has been the custom in this country, sanctioned by the Constitution and laws of the respective States, to identify persons accused of crime by examining the peculiar color of their hair, the peculiarity of their features, conspicuous scars upon their persons, the want of an eye or tooth, "or any other visible defect or mutilation." Burrill on Circ. Ev. 639-651. Marks made by wounds upon the person of an offender given with a weapon in the hands of an assaulted party, corresponding with marks visible upon the person of the prisoner, have always been considered as a strong criminating circumstance tending to establish the identity and guilt of the accused person. Burrill on Circ. Ev. 641.

In discussing the various means of identifying persons this author says: "There are cases, again, in which the identity being positively sworn to, and as positively denied, the witness resorts to another class of circumstances as tests of the accuracy of his test testimony, such as marks upon the person not prominently visible, or even such as are quite concealed by the ordinary clothing, and thus invisible to any but one who has been intimately acquainted with the subject, and who consequently possesses the most complete means of knowing its identity." Burrill on Circ. Ev. 644.

Many cases are cited in the books where evidence of this character has been admitted; and, although not always conclusive, it has frequently been very efficacious in enabling juries to satisfactorily determine the disputed question of identity. I shall refer to but one case. Joseph Parker was indicted and tried for bigamy, at the Court of Oyer and Terminer in New York, in 1804, under the name of Thomas Hoag, *alias* Joseph Parker. Numerous witnesses were examined, who stated, in positive terms, that they knew defendant was Thomas Hoag. Many peculiarities in the features, voice, style and habits were testified to; also the fact of "a scar on his forehead, partly covered by his hair, and another scar on his neck." These peculiarities were all observable in the prisoner. On the

other hand witnesses were equally positive that the defendant was not Thomas Hoag, but was Joseph Parker. Finally, "among the marks sworn to have been observed on the person of Thomas Hoag was a large and visible scar under one of his feet, occasioned by his having trodden on a drawing-knife, which some of the witnesses swore they had seen. This proved to be a decisive circumstance in the prisoner's favor. For on exhibiting his feet to the jury, not the least mark or scar could be seen upon either." Burrill on Circ. Ev. 650.

This case brings to mind another view of the constitutional phase of this question.

Under the law, as it existed for many years in the several States, a defendant was not allowed to testify in his own behalf. If the principle contended for by appellant is correct Parker ought not to have been allowed to exhibit his feet to the jury, because this was allowing him to make evidence in his own behalf. Would any court in christendom, in construing such a law, refuse to allow the defendant to establish a fact in his own favor in the manner allowed in *Parker's* case?

To illustrate this proposition. Suppose the truth to have been that the defendant in this case was really Sam Good, as he claimed, and not Ah Chuey, as was claimed by the prosecution; that the witness Rhoades was mistaken in his testimony, and that the laws of the State prohibited a defendant from testifying in his own behalf, and the court had refused to allow the defendant to pull up his sleeve so as to exhibit his arm for the purpose of showing as a fact that there was no tattoo mark thereon as testified to by the witness Rhoades. Could such a ruling have been sustained upon the ground that the exhibition of his arm was allowing him to testify in his own behalf? Certainly not. Why? Because that law, as well as the clause of our State Constitution, relates to testimony given by the defendant or statements made by him, and cannot be applied to prevent the ascertainment of the truth as to the existence or non-existence of any scar or mark upon the defendant's person by allowing him in the one case or compelling him in the other to exhibit the fact to the jury.

In discussing the questions involved in this case I wish it to be distinctly understood that it has not been my intention in any manner, shape or form to deny the correctness of the general and well-established principle of law that a witness cannot either in a

civil or criminal case, be compelled to give any testimony which would have a tendency to convict him of any criminal offense. This principle applies as well to the production of letters or documents, the contents of which would tend to criminate him, as to his oral testimony. But of all the numerous authorities upon this point to which my intention has been called, there is but one, that of *State v. Jacobs*, which, in my opinion, has attempted in any way to apply that principle to the facts of a case at all analogous to the one under consideration. I have endeavored to show that the *Jacobs* case could not be sustained upon that ground, either under the provisions of the Constitution or upon any principle of the common law.

[Omitting another question.]

I am of opinion that the judgment of the District Court ought to be affirmed, and the court below directed to fix a day for carrying the sentence into execution.

It is so ordered.

LEONARD, J., dissenting.

NOTE BY THE REPORTER.— The principal case was decided by a majority of one, but the question is so important, and the cases involving similar questions have become so numerous, that we decided to report it. We extract the following from the dissenting opinion : “That a defendant in a criminal action cannot be compelled to be a witness against himself is not questioned by counsel for the State, nor by the court ; and the inquiry before us is, whether or not the compulsion complained of deprived defendant of a substantial right secured by the Constitution and laws, statute and common. Had the district attorney asked the defendant whether he had on his right forearm the tattoo mark described, and had the court, against defendant’s consent, compelled him to answer that he had such mark, there can be no doubt that such action would have been a grave error. Could the court at the trial, in the presence of the jury, by other forcible means, accomplish indirectly what it could not do by direct means ? Was the compulsion complained of an infringement of the spirit of the common law and the Constitution ? The fact which the State desired to establish for the purpose of defendant’s identification was the existence of the mark described. There were three possible, if not proper, methods of establishing the desired fact to the satisfaction of the jury : By the testimony of witnesses who had seen the mark, the voluntary or involuntary admission of defendant that he had such mark, and by an actual inspection by the jury. The latter method was adopted in part, without the defendant’s consent, and after the ruling of the court upon the competency and propriety of such method of proof, it must be admitted to have been as convincing to the jury of the fact sought to be proved as any evidence which might have resulted from either of the other methods named could possibly have been. That it would have been competent to prove the fact sought by the first method — the testimony of witnesses other than the defendant — or by the voluntary admission of the defendant, there can be no doubt. That an involuntary admission or statement of the fact by defendant before the jury would not have been competent or proper is just as certain. We arrive then at the inevitable conclusion that a result as detrimental to defendant was reached by the method adopted, as could have come from either of the proper methods mentioned, or by the one admitted to be improper. In other words, compelling defendant to exhibit the mark to the jury, established the desired fact as conclusively, at least, as the competent testimony of witnesses, or a voluntary or compulsory admission of defendant, could have done.

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"So far as I am able to ascertain the fact, every State in the Union has a provision in its Constitution protecting persons accused of a crime from criminating themselves, except New Jersey, Georgia and Iowa. It seems from *Hydon v. Heard*, 14 Ga. 259, that the former Constitution of that State had a provision like ours; but in the new Constitution, adopted in 1868, I find none. In some of the States the provision is like ours that 'no person in a criminal case shall be compelled to be a witness against himself.' In others that 'such person shall not be compelled to give evidence against himself.' In others, that such person 'shall not be compelled to testify against himself.' In Kansas it is that 'no person shall be a witness against himself.' In others, that 'no person in a criminal case shall be compelled to furnish or give evidence against himself.' In Maryland, that 'no man ought to be compelled to give evidence against himself.' In Rhode Island that 'no man in a court of common law shall be compelled to give evidence criminating himself.' I have no doubt that the intention of the different States in adopting these provisions was the same; and yet, technically some give greater protection than others. Prohibiting a person from being compelled to give evidence, is certainly the same as a prohibition against compelling him to be a witness. But strictly speaking the provision that 'no person in a criminal case shall be compelled to testify against himself' affords less protection than either of the others just mentioned.

"As I understand, the court construes the clause in question of our Constitution as though it read: 'No person, etc., shall be compelled to testify or make any statement against himself;' and that it gives the accused no other protection except from acts 'which have a tendency to degrade, humiliate, insult or disgrace' him. I quote from the decision: 'The Constitution means just what a fair and reasonable interpretation of its language imports. No person shall be compelled to be a witness, that is, to testify against himself. To use the common phrase, it 'closes the mouth of the prisoner.' A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation for the purpose of proving or disproving any question at issue before any tribunal, court, judge, or magistrate. This is the shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but as before stated, for the sole reason that in the sound judgment of the men who framed the Constitution, it was thought that owing to the weakness of human nature and the various motives that actuate mankind, a defendant accused of crime might be tempted to give testimony against himself that was not true.' Again the court says: * * * 'In all countries and in all ages, whatever the law or custom may have been, it was always claimed as a reason for its adoption that it was calculated to discover the truth, and thereby promote the ends of justice. Such is claimed to be the rule of our Constitution and laws upon this question.'

"In my opinion, the court has not stated the only reason why the provision in question was placed in the Constitution. Had that been the only one, there would have been a prohibition against allowing a defendant to testify for himself; because in the latter case there was and is a hundred-fold more danger of falsehood than in the former. Is there not an additional reason why this provision was adopted? Was it not, in part at least, because of the enlightened spirit of the age, that a man accused of a crime should not be compelled to furnish evidence of any kind which might tend to his conviction? Did it not come to some extent from the spirit of justice and humanity which established the first of all legal presumptions — that every person shall be considered innocent until proven guilty? See *Wilkins v. Malone*, 14 Ind. 156. Mr. Starkie says: 'Upon a principle of humanity, as well as of policy, every witness is protected from answering questions by doing which he would criminate himself; of policy, because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors.' Stark. on Ev. 40. It will be noticed that the author says 'a witness is protected from answering questions,' etc., which, I admit, does not, in terms, cover this case but I quote it for the purpose of showing, from him, that the reason why the provision of the Constitution under consideration was inserted was not solely to prevent the accused from stating a falsehood, whether for or against himself.

"In 1853 the Constitution of Arkansas provided that 'in all criminal prosecutions the accused shall not be compelled to give evidence against himself.' In the present Constitu-

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tion the provision is the same as ours. To give evidence is certainly to be a witness, and there is no substantial difference between them. In construing the provision in the old Constitution (*State v. Quarles*, 13 Ark. 309), the court said: 'This places a restriction upon the power of the legislature to the extent that no law can be enacted by that body to compel one accused to give evidence against himself, and by necessary implication also prohibits any law by which a witness in any prosecution should be compelled to disclose criminal matters against himself, so long as it might remain lawful that such disclosures could be afterward produced in evidence against him in case he in turn should be the accused party. Hence it seems inevitable that, although witnesses are not expressed in the terms of the provision of the bill of rights that we are considering, yet they are substantially embraced to the full extent of a complete guarantee against self-accusation. Consequently, so long as the common-law rule might prevail, that voluntary disclosures of a witness in a criminal prosecution may be used in evidence in an after prosecution against him, when he in turn had become the accused party, he would be as much entitled to this guarantee when interrogated as a witness as the accused party.' The books are full of the same doctrine. *People v. Hackley*, 24 N. Y. 75.

"In Wharton's Law of Evidence, section 536, it is said that 'a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be insured;' and also, section 731, 'what is elsewhere said as to the protection of witnesses from questions which call for criminatory answers, applies to the production of criminatory documents. Neither equity nor common-law practice will compel a person to allow the inspection of either public or private documents in his custody, where the document, if produced, would criminate the party producing.' See, also, § 533. And in Taylor's Law of Evidence, the author says in section 1351: 'In accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence that may expose him to a criminal charge, neither the Court of Queen's Bench nor the Court of Chancery will ever oblige a person to allow the inspection of either public or private documents in his custody, where the inspection is sought for the purpose of supporting a prosecution against himself.' In *Regina v. Mead*, 2 Ld. Raym., the defendant and others were incorporated by the name of the surveyors of highways and were trustees of a charity. An information was preferred against the defendant for executing this office without having taken the oath as required by statute. The defendant pleaded not guilty. Counsel for the prosecution moved for a rule, that the prosecutor might have two books produced which these surveyors kept, in which they entered their elections, and also their receipts and disbursements, and that he might take copies of what he thought necessary, and that the books might be produced at the next assizes at the trial. 'But *per curiam* denied, because they are perfectly of a private nature, and it would be to make a man produce evidence against himself in a criminal prosecution.' See also *Domínus Rex v. Cornelius*, 2 Str. 1210; *Bank v. Trapp*, 24 How. Pr. 21.

"I think the framers of the Constitution and the people who adopted it intended that at criminal trials the accused, if such should be his wish, should not only have the right to close his mouth, but that he might fold his arms as well, and refuse to be a witness against himself in any sense or to any extent, by furnishing or giving evidence against himself, whether testimony under oath or affirmation, or confessions or admissions without either, or proofs of a physical nature.

"It is undoubtedly true that the evident intent and spirit of the Constitution upon this subject is in harmony with the common law; but I have endeavored to show that the protection given to accused persons does not necessarily depend upon the constitutional provision. Several of the States, as we have seen, have no such provision, and yet the common-law rule is the same there as here, if in force, and protects all persons from criminating themselves against their will. At a criminal trial, courts cannot take notice of the manner of obtaining evidence out of court. If it is competent and pertinent to the issue, it will be received. If it is a forced confession alone, it will not be admitted in evidence for the reason stated above. If the confession has led to a fact that cannot be false, it will be received for that reason; but I insist that the same rule does not obtain in court, in relation to facts there disclosed by an involuntary confession, or by any compulsory disclosure tending to criminate the defendant. Suppose the proof in this case had been that defendant killed some human being, and that he had voluntarily told another Chinaman that he

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killed Ah Tong and buried him, without stating the place of burial; that the State, having been fearful that the jury would not believe the Chinese witness, asked the court to order the defendant to go with the sheriff and point out the body; that the court so ordered, and against defendant's consent, compelled him to obey: that the body was pointed out, that fact having been testified to by the sheriff, and the defendant convicted. If the body had not been found, it would have been error, because the compulsion might have prejudiced the minds of the jury against the defendant. But inasmuch as it was found, I am unable to perceive, from the theory of the court, why such practice would not have been proper, because the result — the fact found — could not have been false, and it would have tended to prove the confession true.

"Suppose, again, that a person is accused of stealing a gold bar. The defendant goes upon his trial before it is found. The State proves the larceny and many facts tending to show defendant's guilt. A witness testifies to facts showing almost, but not quite, conclusively, that defendant has the bullion concealed about his premises. Thereupon, at the request of the district attorney, the court states to the defendant that there has been testimony concerning his possession of the bullion, but of the fact he neither has an opinion nor expresses any; that he will instruct the jury that the order he is about to make is no indication that he considers the defendant guilty, and that they must so consider it. Thereupon the court says to the defendant: 'If you have the bullion, and will point it out and deliver it to the sheriff, I will give you a light sentence in case you are convicted; and if you will not do so, should the jury find you guilty, I will give you the full punishment allowed by law.' The defendant delivers the bullion to the sheriff, the jury is charged as promised, and a conviction follows. Is there any doubt that such conduct on the part of the court would be error? Still, in neither of the supposed cases is the defendant required to speak or testify, and in both there is no opportunity or object to falsify. The finding of the body and the bullion tell their own tales. In both cases hope and fear may have induced the confession or discovery, but in both the discovery shows evidence of guilt which cannot be falsified or simulated.

"If witness Rhoades had testified that he knew the defendant was Ah Chuey, because he was a good English writer and had for years kept a diary; that he wrote in it every day and signed his name, 'Ah Chuey,' to each entry; that he saw the book a few minutes before coming into court; that defendant then had the book upon his person, would any one say that the court, without error, could have compelled him to show the book to the jury? And yet, why not on principle, if he could be compelled to exhibit a private, harmless mark for the same purpose? The object would have been to ascertain the truth, and the result would have verified the statement. Suppose, instead of the head and bust of a woman, he had written upon his breast, in India ink, the words, 'I am Ah Chuey;' why could those words be shown with more propriety than the words in the diary, and could they not have been shown if it was proper to compel him to exhibit the mark?"

"Had the identifying mark been upon some portion of the body not concealed, and had the jury seen it by reason of the defendant's presence in court, I do not say they could not have acted upon the fact so observed. What I say is, that whether the mark is concealed or not, the court cannot compel a defendant, for the purpose of identification, or any other, the tendency of which is to criminate, to exhibit himself or any part of himself before the jury as a link in the chain of evidence. An accused person cannot be compelled to discover a fact while on trial, nor can he be compelled to be an unwilling instrument of discovery or proof after the discovery has been made by other evidence. He may refuse to plead even, and instead of making such refusal evidence of guilt the law provides that the plea of 'not guilty' shall be entered. Had the defendant been accused of a misdemeanor only, his presence in court would have been unnecessary. Under such circumstances, had he elected to remain absent from the trial, I have no hesitation in expressing an opinion that it would have been error had the court caused the sheriff to bring him into court against his will, and there exhibit the mark; nor do I think the fact that he was required to be present in court in any manner abridged the right which he would otherwise have had.

"But few decided cases have been found by counsel, the court, or myself, wherein the question involved in this case has been decided directly, but all that have come under my notice sustain the conclusion to which I have arrived and endeavored to express. The

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first case is *State v. Jacobs*, referred to by the court. In commenting upon that case, the court says it was decided upon two grounds, the second of which was that 'the manner in which the defendant was compelled to exhibit himself was prejudicial to the defendant.' It is not apparent from the decision that the defendant was treated indecorously or in any way prejudicial to his case, except that he was compelled to go before the jury and submit to their inspection. This is what that court said in relation to the manner: 'Another argument of more weight is that the testimony when afforded to the jury is not incompetent, though it might have been an act of tyranny in the court to compel it. But this argument proves too much, and would be equally available if admitted in favor of the competency of a deed, or other private paper, which the court might wrongfully have compelled a defendant to produce. Surely, in such a case, the manner in which the deed or paper was produced and offered would be error, although the deed or paper, if fairly brought before the jury, would be competent evidence.' I submit that the 'manner' spoken of by the court referred only to the fact that the defendant was compelled to exhibit himself, and thus furnish evidence against himself; that proof of his status as a free negro, by him, was incompetent, while if the same fact had been proven by other persons who knew him, such proof would have been competent. If such is the case, then the second ground of reversal stated by the court was only stating the first ground in a different way. In my opinion the only point decided in that case was that it was error to compel the defendant to exhibit himself before the jury for the purpose of showing that he was a negro. The next case is *The State v. Johnson*, 67 N. C. 17. The indictment charged Johnson, a colored man, with ravishing Susan Thompson. When she was on the stand as a witness for the State she was asked by the solicitor to look around the court-room and see if she could see the man who committed the rape on her. She pointed to the defendant and said, 'That is the black rascal.' It was insisted by the defendant's counsel that this was making the prisoner furnish evidence against himself. The court say: 'In support of his objection the prisoner relied upon *State v. Jacobs*, in which it was decided that the defendant could not be compelled to exhibit himself to the jury that they might see whether he was within the prohibited degree of color. But that case is not like this. There he was compelled to exhibit himself to the jury, that the jury might determine, by inspection, his quality and condition, his blood or race. That was a matter to be proved by the oath of witnesses who knew the facts, or, it may be, by experts. And although the defendant could not be compelled to exhibit himself to the jury, yet it would be competent for witnesses who knew him to speak of his color and of any facts within their knowledge, and to point to him as being the identical person of whom they were speaking.' Suppose it was a matter to be proved by the oath of witnesses or by experts. Was it any the less error to compel the defendant to exhibit himself to the jury and supply the place of other witnesses? It will be noticed that in *Johnson's* case the court reiterates what was decided in the *Jacobs* case that 'defendant could not be compelled to exhibit himself to the jury.'

"The next case is *State v. Woodruff*, 67 N. C. 90. In that case, as in *Johnson's*, I draw attention to the fact that the defendant was not exhibited before the jury. He sat in his place, as he had a right, and was obliged to do. The bastard child was exhibited, or rather held in its mother's arms while she was testifying, and in his address to the jury the solicitor called attention to the child's features and commented upon its appearance, the child being still before the jury. I have nothing additional to add in relation to the right of the State to have the defendant accused of felony present in court, and the right of the jury to observe him while there; and in case of misdemeanor the right is the same if he voluntarily appears in court. Certainly the solicitor had the right to call the attention of the jury to the child's features, and that was all he did do. At any rate, the defendant was not disturbed in any manner, and if the jury gathered any additional information as to his appearance, it was the result of necessity in giving him his constitutional right to be present in court; it was not the result of compulsion by the court. Besides, if, in truth, in the *Jacobs* case, it did no good or harm to parade him before the jury, if they discovered nothing but what they knew before he was exhibited, still those facts would not have changed the result in the appellate court. That court could not have known that the error, if such it was, was harmless.

"It is the capability of abuse, and not the probability of it, which is to be regarded in

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judging of the reasons which lie at the foundation, and guide in the interpretation, of such constitutional restrictions.' *Emery's case*, 107 Mass. 183; s. c., 9 Am. Rep. 22.

"To show that the court in *Wondruff's* case recognized the distinction that I am endeavoring to make between exhibiting the defendant, as was done in the *Jacobs* case, and allowing him to sit undisturbed in the presence of the jury, as was done in the *Wondruff* case, and to show by implication that the court still adhered to the opinion in the *Jacobs* case, I quote a few lines from the decision: '*State v. Jacobs* has been argued as an authority to show error in this case, as if the court had ordered the defendant to stand up and exhibit himself before the jury, as was done in the *Jacobs* case. But the record shows no such thing, and therefore the argument founded on that supposition fails.'

"The *State v. Garrett* is the next case. The fact is not that the defendant was compelled to unwrap her hand and exhibit it to a physician before the coroner's jury, as such, although it was done in their presence. The jury had rendered their verdict against her before she was compelled to show her hand. Whether she could have been compelled to exhibit her hand while the jury were acting, and before their verdict, is not in the case, and that fact, at least, must appear before it can be claimed that the *Garrett* case should have been governed by the controlling principle enunciated in the *Jacobs* case. Compelling the defendant to show her hand after the verdict against her did not change the verdict, and the effect of a disclosure at that time, and under such circumstances, was the same as though it had been compelled by any of the spectators present. At the trial the defendant objected to evidence as to the condition of her hand, and relied upon the *Jacobs* case. The court said: 'The distinction between that and our case is, that in the *Jacobs* case, the prisoner himself, on trial, was compelled to exhibit himself to the jury, that they might see that he was within the prohibited degree of color, thus he was forced to become a witness against himself. This was held to be error. In our case, not the prisoner, but the witnesses, were called to prove what they saw upon inspecting the prisoner's hand, although that inspection was obtained by intimidation.'

"The *Stokes* case is the next. There the court said: 'In the presence of the jury the defendant was asked to make evidence against himself; that is, he was asked to take off his boot and make a new track to be compared with the one found near the scene of crime. I am unable to perceive how it would have been less erroneous to have asked him, in the presence of the jury, to place his foot in the track already made, or to take off his boot and show his bare foot for the same purpose. In either case the defendant would have been asked to furnish a factor necessary in arriving at a conclusion whether or not his foot made the track found near the place of homicide, and inferentially, whether or not he was the guilty party. The method adopted might have been more convincing to the jury than either of the others mentioned had the court held it proper, but I fail to see how it was more erroneous.'

"I find nothing in the quotation made by the court from Story and Blackstone against the views I entertain. Judge STORY says the insertion of this clause 'is but an affirmance of the common-law privilege; that it was adopted to prevent the evils which had resulted from the custom of other countries in compelling criminals to give evidence against themselves, and of being subjected to the rack or torture in order to procure a confession. A part of the object then was to prevent the giving of compulsory evidence. Surely, that is not confined to testimony or statements coming from the mouths of witnesses or accused persons. As to *Hoag's* case, referred to by the court, it is enough to say that it is evident from the text that his foot was exhibited to the jury by the defendant himself. Besides, the result was entirely in his favor and he was acquitted. Mr. Burrill does not intimate, nor does any other text writer, so far as I am able to find, that it would have been competent for the State to have compelled the prisoner to show his foot in court in aid of the prosecution. If the law of New York had not allowed Hoag to testify in his own behalf, and had the law been the same in this State at the time of the defendant's trial, I agree with the court that at his own request, the first could have exhibited his foot, and the last his arm, to the jury. But my conclusions from those facts are very different from those arrived at by the court. The reason why they would have been allowed to do so is because the reasons for the law's exclusion of testimony would not have existed in relation to proofs offered by them independently of their testimony. Self-interest might have

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prompted them to commit perjury if allowed to testify ; hence under the old rule, they would have been excluded as witnesses. But as to physical peculiarities, the reason of the rule, and hence the rule itself, would have failed. I am unable to understand why the constitutional provision, that 'no person shall be compelled to be a witness against himself in a criminal case,' should be construed as relating solely to testimony given, or a statement made by him, because, under a law not allowing him to testify, he may exhibit himself for the purpose of proving a physical peculiarity independently of any testimony.

"My conclusion is that under both the Constitution and the common law, it was error to compel the defendant, at the trial, to make a disclosure which, with the testimony of witnesses, tended to prove him to be Ah Chuey, and indirectly to establish his guilt. I think the error is as great as it would have been had the court compelled the defendant to admit that he was Ah Chuey. It accomplished the same result. In criminal cases the State must prove guilt without the aid of the accused at the trial, unless the guaranteed rights are waived, when a waiver is permissible."

In *State v. Prudhomme*, 25 La. Ann. 523, the court said : "The tracks of the murderer were found near the scene of the murder, and to enable the witness who saw the tracks to state how they corresponded in size with the feet of the prisoner, he was forced to take his feet from under a chair where he had put them. This the prisoner's counsel calls forcing him to give evidence against himself. A mere statement of the facts shows how utterly untenable the objection is. The witness was required to look at the feet of the prisoner in order to testify to facts which might enable the jury to connect the prisoner with the perpetrator of the crime and we are unable to perceive how any constitutional right of the prisoner was infringed by compelling him to place his feet where they could be seen by the witness and the jury." In *Day v. State*, Georgia Supreme Court, Nov. 1879, the court said: "The defendants, Whit Day and Jesse Slayton, were jointly indicted for the offense of burglary in the night-time. * * * The evidence mainly relied on for the conviction of the defendants was certain tracks which were similar to those made by the defendants, found near where the burglary was alleged to have been committed. * * * Allen, a witness for the State, testified in relation to Slayton, the other defendant, that he was stubborn, did not want to put his foot in the track, said he was innocent of the charge. Witness took hold of him, pulled him along, and then put his foot in the track; witness took hold of his foot and put it in the track ; he did not consent to it; the shoe fitted the track. This evidence was objected to by the defendant, the objection was overruled, and that is one of the errors assigned. By the Constitution of this State no person shall be compelled to give testimony tending in any manner to criminate himself. Nor can one, by force, compel another against his consent to put his foot in a shoe track for the purpose of using it as evidence against him on the criminal side of the court."

In *People v. McCoy*, 45 How. Pr. 216, an indictment of a woman for murder of an illegitimate child at birth, the coroner had directed two physicians to go to the jail and examine her private parts to determine whether she had recently been delivered of a child. She objected to the examination, but being threatened with force, yielded, and the examination was had. Their evidence was offered on the trial, and ruled out. The court said the proceeding was in violation of the spirit and meaning of the Constitution, which declares that "no person shall be compelled in any criminal case to be a witness against himself." "They might as well have sworn the prisoner, and compelled her, by threats, to testify that she had been pregnant and had been delivered of a child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child." "Has this court the right to compel the prisoner now to submit to an examination of her private parts and breasts by physicians, and then have them testify that from such examination they are of the opinion she is not a virgin, and has had a child? It is not possible that this court has that right; and it is too clear to admit of argument that evidence thus obtained would be inadmissible against the prisoner." See *Walker v. State*, 1 Tex. Ct. App. 245; s. c., 33 Am. Rep. 595, agreeing with the principal case.

The *Albany Law Journal*, in criticising the principal case, 22 A. L. J. 144, says: "The prevailing opinion * * * likens the exposure in this case to compelling a prisoner to remove a veil or mask. The distinction however is, that there the prisoner tries to conceal evidence which is ordinarily visible, and from which the jury have a right to draw a conclusion, and the removal simply restores that evidence. The prisoner has no more

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right to hide his face than to secrete his whole person. The court also liken the ruling to the searching a prisoner and finding false keys or stolen property upon him. The sufficient answer to that is, that such things are not part of his person, but are circumstances by which he has surrounded himself. When these circumstances are disclosed, it is not the man who is compelled to give evidence against himself, but the circumstances by which he has environed himself." "In *Walker v. State*, 7 Tex. Ct. App. 245," held, "counsel acutely argued that 'if this prisoner can be compelled to make an impression with his foot in order to see if it is similar to the impression made by the foot of the person who committed the crime, then if he were charged with forgery he could be compelled to take a pen, and write in order to see if his handwriting was similar to that of the party who had committed the forgery.' (This he may now by statute be compelled to do in England.) This decision, founded on *State v. Graham*, *infra*, and *Stokes v. State*, *infra*, is distinguished on the ground that there 'the prisoner was asked in the presence of the jury to make evidence against himself,' — a perfectly futile distinction, as we shall see. The worst of this decision is that it permits secondary evidence of incompetent evidence — evidence of an experiment out of court, which, if tried in court, might not have been conclusive against the prisoner."

"In *State v. Garrett*, 71 N. C. 85; s. c., 17 Am. Rep. 1, at a coroner's inquest, upon the body of a person found dead, it was proved that defendant had said that deceased was accidentally burned to death, and that defendant had burned her own hand in trying to put the fire out. Defendant being then in custody on suspicion of having murdered the deceased, was ordered by the coroner to show her hand, which she did, and it appeared uninjured. Held, that evidence of such fact was admissible upon the trial of defendant for the murder. This must be classed with the mask and veil as an instance of an attempt to conceal evidence ordinarily visible. The jury of course have a right to scrutinize patent facts, such as stature, shape, complexion, hair, features, scars, loss or peculiarity of members, etc. These are public matters, which the public cannot be prevented from viewing, and which the prisoner knows are liable to comment and comparison. Of these, witnesses who observed them may speak, or the jury may look at them in court. So if witnesses have observed the patent characteristics of gait and voice, they may testify to them, or the jury may observe the prisoner's gait as he naturally and voluntarily walks, or his voice as he voluntarily speaks. But it will be contended, that on a question of resemblance of gait, the court can compel the prisoner to get up and walk, or that on a question of voice, they can compel him to speak?" Of the *Stokes* case: "It is impossible to distinguish this case. If the court had considered the evidence competent, it would have compelled the prisoner to 'make tracks,' or instructed the jury that his refusal might be considered against him. The court said: 'In the presence of the jury the prisoner is asked to make evidence against himself.' That is exactly what he was asked in the tattoo case, and what he was compelled to do in the *Graham* case. It is immaterial whether he is compelled to do it out of court or in court. The distinction drawn by the court in the *Walker* case against the *Stokes* case would apply just as well to the *Graham* case." The *Journal* concludes: "Neither Wharton nor Bishop expresses any opinion on this question, but it seems to us that on principle a prisoner cannot be compelled to say any thing, nor do any thing, nor submit to any act addressed to his actual person, which may tend to criminate him." The *Central Law Journal* expresses a similar opinion of the principal case.

GASTON V. DRAKE.

(14 Nev. 175.)

Contract — illegal — to divide fees of office.

An agreement before an election to share the salary and fees of an office, in consideration of the plaintiff's using his influence to elect the defendant to such office, is void.

ACTION for partnership accounting. The opinion states the case. The plaintiff had judgment below.

Lindsay & Dickson, for appellant.

Lewis & Deal, for respondent. A contract for the division of fees is valid and must be upheld. *Mott v. Robbins*, 1 Hill, 21; *Becker v. Ten Eyck*, 6 Pai. 68; 7 Bac. Abr. 301; 3 Minn. 413.

LEONARD, J. It is alleged in the complaint that plaintiff and defendant, on or about February 3, 1876, formed and entered into a copartnership to practice law in Storey county, and State of Nevada; that by the terms of the contract of partnership, each was to share equally, share and share alike, in all the labors of practice, and in the fees and profits arising therefrom; that in the fall of 1876, by and with the advice and consent of plaintiff, defendant became a candidate for the office of district attorney of Storey county; that it was agreed between plaintiff and defendant that if defendant should be elected to said office, the said copartnership should continue upon the terms above stated, and that said partners should share equally, share and share alike, in the profits, fees, and emoluments of said office and business; that defendant was elected on the 7th day of November, 1876, and on the 2d day of January, 1877, he duly qualified and entered upon the discharge of the duties of said office; that from time to time thereafter plaintiff greatly assisted defendant in performing the duties of said office, upon the request of the latter, and upon his promise to divide the proceeds equally with plaintiff; that plaintiff has performed his every duty in said partnership and in said office, and has divided equally with defendant all fees and moneys which came

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into his hands belonging to said partnership ; that during its existence, defendant received about the sum of \$13,225.24 as fees belonging to said partnership, in excess of his just share; that though often requested so to do, he has refused and failed to settle and account with plaintiff, or to pay to plaintiff any part of said proceeds of said partnership. Plaintiff prays for an accounting and settlement, and that defendant be required to pay over to him one-half of the fees and profits of the partnership stated in the complaint, to wit, \$6,612.62. Defendant demurred to the complaint generally and specifically, and the demurrers were overruled. In his answer he admits the contract of partnership first alleged, but denies specifically each and every material allegation of the complaint in relation to the alleged contract, or any contract or agreement concerning the office of district attorney, or any division of fees or profits thereof.

The court called a jury to decide this special issue, to wit: "Did the plaintiff and defendant enter into an agreement, or have an understanding, that they should divide equally the profits and emoluments of district attorney of Storey county?" Upon the issue submitted, the jury found for plaintiff. It is said by defendant that they so found in consequence of an instruction claimed to be erroneous; but as we view the case, that need not be considered. The court, in terms, adopted and confirmed the verdict, and an accounting was ordered and had between the parties. Among other facts, the court found the following: "That on or about September 1, 1876, after the defendant had become a candidate for the office of district attorney of Storey county, and before he was elected thereto, the plaintiff and defendant entered into an agreement to divide the salary, fees, and emoluments of said office; that the consideration for said agreement was that the plaintiff should use all his influence to secure the election of the defendant to said office, and in the event of the election of defendant to said office, to assist him in the performance of the duties of said office; that said partnership and agreement terminated on the 5th day of April, 1877; that about said date, plaintiff notified defendant that he was ready to assist in closing all business then pending; that upon full accounting there was in the hands of plaintiff, or had been collected by him, of the partnership assets, the sum of \$690, and by defendant, of partnership assets and salary and fees belonging to said office of district attorney, the sum of \$7,156, of which \$6,705

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were derived and collected from the salary and fees of said office; that there was then due from defendant to plaintiff the sum of \$3,233, being one-half of the balance in his hands, over and above what was collected by plaintiff." As a conclusion of law, the court found that plaintiff was entitled to judgment against defendant for the sum of \$3,233, together with his costs. Judgment was entered accordingly, and this appeal was taken from an order overruling defendant's motion for a new trial, and from the judgment.

It is proper to state that it appears from the complaint that the sum of \$13,225.24, one-half of which was claimed as being due to plaintiff, was made up of fees appertaining to the district attorney's office. Of the \$690 collected by plaintiff, it does not appear that any came from fees of that office; while from the court's findings, it appears there were \$451 in defendant's hands that did not come from that source.

It is urged by counsel for defendant that the contract alleged to have been entered into between plaintiff and defendant, and that found by the court, were and are opposed to public policy, in contravention of the election law of the State, and wholly void.

It is claimed, on the other hand, by counsel for plaintiff: 1. "That the finding, that a part of the consideration for the contract was a promise by plaintiff to use all his influence to secure the election of defendant, was unwarranted by the pleadings, is wholly nugatory, and cannot be considered by this court; that if the fact that plaintiff agreed to use his influence was a material fact, and rendered the agreement void, it should have been pleaded; that defendant should have alleged that such promise was made, and that by reason thereof, the entire contract was rendered void. 2. That the contract set out in the complaint, and the only one the court had power to find, is valid." For reasons that will subsequently appear, we think it unnecessary to decide whether or not, in fact, the findings of the court above stated and objected to by the plaintiff's counsel were within the issues made by the pleadings. All of plaintiff's testimony showing the agreement and the consideration therefor is in the statement, and it is not said and cannot be claimed, that there is no evidence to sustain the court in its findings. Plaintiff's testimony in chief was voluntarily given by him, and no objection was made, or could have been made, to any question asked upon his cross-examination. Keeping in mind these facts, we will first consider

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plaintiff's objection to the court's finding, and to a consideration of the same by this court.

It cannot be doubted at this day, nor is it denied, that a contract will not be enforced if it is against public policy, or that if a part of the consideration of an entire contract is illegal as against public policy or sound morals, the whole contract is void. *Garforth v. Fearon*, 1 H. Bl. 327; *Powers v. Skinner*, 34 Vt. 281; Story's Eq. Jur., §§ 296, 298; *Carlton v. Witcher*, 5 N. H. 198; *McCausland v. Ralston*, 12 Nev. 212. Nor does it matter that nothing improper or illegal was done, or was expected to be done, under the contract; the principle is controlled by the tendency of the contract. *Powers v. Skinner*, *supra*; *Atcheson v. Mallon*, 43 N. Y. 149; s. c., 3 Am. Rep. 678; *Richardson v. Crandall*, 48 N. Y. 362; *Clippinger v. Hepbaugh*, 5 Watts & S. 321; *Spence v. Harvey*, 22 Cal. 339.

Courts refuse to assist either party to such contracts, and they refuse to hear such cases, in the interest of the public, not for the sake of plaintiff or defendant. *Holman v. Johnson*, 1 Cowp. 343. No principles are better settled than those above stated.

Valentine v. Stewart, 15 Cal. 389, was a suit in equity to compel a specific performance of a contract concerning lands. After the testimony was in, the court below, of its own motion, dismissed the case, on the ground that the agreement, or a part of it, was in violation of public policy.

In that case, counsel for appellant advanced the views that counsel for plaintiff do in this case. They said in their briefs: "But the court below founded its decree upon supposed facts now here alleged in the pleadings. This was clearly erroneous. A court of equity cannot found its decree upon a fact not alleged in the pleadings, however clearly it may be made out in evidence. * * * But it is contended. * * * that whenever it appears to a court that a contract which is brought before it is against public policy, it will refuse to entertain any suit upon it. * * *

"It is true that when it so appears to the court the court will eject the cause; but then, nothing appears to the court that is not on the record. But if it is meant to assert that a court will decide a contract to be *turpis contractus*, when no fact is alleged upon the record which makes it so, there is no foundation for the assertion."

Counsel for respondent, in their brief, said: "The only question is, whether the fact appearing by evidence properly given under the issues raised by the pleadings, that the consideration was an

immoral one, and the contract one which is against public policy, the court should refuse to enforce performance, where the objection is not specifically raised and made a ground of defense."

We have quoted from the briefs of the respective counsel for the purpose of showing that the point raised there was like the one urged by counsel for plaintiff in this case, and now being considered. In that case the contract set up in the bill was legal, but contemporaneously an illegal contract touching the same matter was executed by the same parties, which was decided to be against public policy, and void. The contract last named was not set out in the bill, but was disclosed by the proofs. The court said: "This is a case of more than ordinary importance, and presents features of peculiar interest. The plaintiffs file a bill for the specific execution of a certain agreement which they set out. Upon the pleadings and proof the District judge dismissed the bill upon the ground that the agreement, as disclosed in the proofs and the facts connected therewith, showed the contract sought to be enforced was in contravention of public policy and void, and that the court would refuse to execute it, though this defense was not specifically or otherwise set up in the pleadings."

After considering the nature of the contemporaneous contract, and deciding that it was void for the reason mentioned, and that the contract which plaintiff was endeavoring to enforce was void also, for the reason that it was wholly or in part executed in consideration of the making of the void contract contemporaneously made, the court further said: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

* * * The authorities and the reason of the rule leave no question as to the right of a court, and its duty, to dismiss from its consideration a case based upon a consideration which contravenes public policy. Courts do not sit to give effect to such illegal contracts. The law is not to be subsidized to overthrow itself though the parties to the litigation may not object to such a meretricious exercise of power. If the public time and the authority of law were thus at the mercy of litigants, the sense of dignity and obliga-

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tion to the laws, from which the court derives its powers, would constrain it to desist from the suicidal task of subverting the laws which it was organized to preserve and administer." See, also, response to petition for rehearing in same case, and *Abbe v. Marr*, 14 Cal. 211; *Hatzfield v. Guldén*, 7 Watts, 154; *Holman v. Newland*, 1 Cowp. 341.

We fully agree with the views expressed in the decision from which we have quoted so liberally. It is undoubtedly the general rule in law and equity that the findings must be warranted by the pleadings. So the cases cited by respondent hold. 42 Cal. 605; 41 id. 284; 33 id. 474. But in neither of those cases was it claimed or held that the contract sued on was opposed to public policy. In neither was the public especially interested. Admitting that in such cases the court must base its findings upon the issues made by the pleadings, it does not follow that it must do so in cases where relief is denied, not for the sake of the defendant, but because it is for the public interest to refuse to entertain the case. All the authorities hold that contracts against public policy should not be enforced, because it is for the public good to leave the parties where they have voluntarily placed themselves. In such cases the court must act for the public, if the defendant does not, and refuse to assist either, "if, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*."

The court having found that a portion of the consideration of the contract on the part of plaintiff was that he should use all his influence to secure defendant's election (as it was its duty to do if the evidence justified such a finding), it then became its duty to dismiss the suit if such a contract was opposed to public policy. It becomes necessary, then, to ascertain the nature of such an agreement.

We shall first consider it as found by the court, including the portion objected to; and second, with that part excluded, or as it is alleged in the complaint.

It is hardly claimed by counsel for plaintiff that a contract like the one found by the court, a part of the consideration of which was an agreement by plaintiff to use all his influence to secure defendant's election, can be sustained or enforced. But it is urged, as before stated, that such a finding was nugatory, and cannot be considered by this court. Having arrived at an opposite conclusion upon that point, we shall content ourselves with a summary dis-

position of the question as to the validity of the contract found by the court. It is undoubtedly void, as contrary to public policy. It was in terms a promise to use not only personal effort, but personal influence, among the voters of Storey county to secure defendant's election. Its influence upon plaintiff was the same as though defendant had promised to give him a definite sum of money in case of election. Success would bring reward, while defeat would result, not only in loss of coveted profits, but time and labor as well. By it plaintiff's love of gain was stimulated, and a great temptation placed before him to promote his own interests regardless of public good. In *Gray v. Hook*, 4 Comst. 454, Hook agreed to withdraw his application for an office and aid Gray in securing the appointment, in consideration of which Gray was to allow Hook one-half of the fees and emoluments of the office as long as Gray held it. The court said (p. 457): "I think that this contract was void, because it stipulated that Hook should have a pecuniary compensation for withdrawing his application, by which he had probably driven off all competition and contributed to reduce the number of applicants to himself and Gray. I have no doubt it is void, because it is stipulated that Hook should have a pecuniary compensation for aiding Gray to obtain the appointment. And I have no doubt that any agreement between two citizens by which one stipulates to pay the other a proportion of the fees and emoluments of a public office which he is seeking, in consideration that the other will aid him in obtaining it, is void."

In *Clippinger v. Heppaugh*, 5 W. & S. 315, it is said that "a contract to procure, or endeavor to procure, the passage of an act of the legislature by any sinister means, or even by using personal influence with members, is void, as being inconsistent with public policy and the integrity of our public institutions. And any agreement for a contingent fee, to be paid on the passage of a legislative act, would be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object."

Mills v. Mills, 40 N. Y. 543, was an action upon a contract to convey certain lands to plaintiff, the consideration of which was that plaintiff "should give all the aid in his power, spend such reasonable time as might be necessary, and generally use his influence and exertions to procure the passage into a law" of a certain bill. The defendants put the principal allegations of the complaint

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in issue by their answers, and upon the hearing, the pleadings and agreement were read in evidence. Defendants moved to dismiss, and the motion was granted upon the ground that the agreement was illegal and void. Judgment was entered, and on appeal it was affirmed. See, also, *Powers v. Skinner*, 34 Vt. 280; *Fuller v. Dane*, 18 Pick. 479, 481; *Wood v. McCann*, 6 Dana, 369, 370; 1 Story's Eq. Jur., § 293, b.; *Faurie v. Morin*, 4 Martin, 39; *Carlton v. Whitcher*, 5 N. H. 196; *Nicholls v. Mudgett*, 32 Vt. 546; *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 333; *Haas v. Fenlon*, 8 Kans. 604; *Martin v. Wade*, 37 Cal. 174.

The tendency of a contract for a contingent reward, to use one's influence to secure another's election to a public office, is as certainly detrimental to the public interest as is a contract to use personal influence to procure the passage of a law, or to obtain a pardon.

This brings us to a consideration of the contract as stated in the complaint, stripped of the illegal promise just noticed. And with the circumstances attending its making, it may be stated thus: A short time before the primary election, when plaintiff and defendant were partners in the practice of law, both being of the opinion that if defendant should be elected, their business, both civil and criminal, would be greatly increased, they agreed that defendant should run for the office of district attorney, and if elected, they should share equally the labors and profits; or to state it in the language of counsel for plaintiff, they agreed that "if Drake was elected, Gaston was to aid him in the business of the office, for which services he was to receive one-half of the fees," etc. Was such a contract valid, or void as against public policy? What was its tendency, whether entered into by honest, or by designing and corrupt men? We are referred by counsel for plaintiff to cases decided under statutes against buying and selling offices, wherein it is held that a principal holding an office may make a deputation, reserving a portion of the salary or fees to himself, and give the balance to his deputy for services. *Mott v. Robbins*, 1 Hill, 21; *Becker v. Ten Eyck*, 6 Paige, 68; 7 Bac. Abr. 301. Also, that a sheriff may give to his deputy all the fees pertaining to the services he may render as such. *Printing Co. v. Sanborn*, 3 Minn. 418. But in all of those cases the deputation was made after the election of the principal, and therefore the appointment or promise to appoint could not have had an influence upon his election.

We shall not discuss the question whether the contract now under consideration would have been valid or void if made after election. This is not our case. Plaintiff testified, among other things, that when defendant first spoke to him about running for the office, defendant said: "I think if you and I stand in for the office together, we have got friends enough to secure the nomination and election. I wish you would think it over till to-morrow, and if on reflection you are willing, we will stand in for it;" that plaintiff replied: "Mr. Drake, the idea strikes me favorably, and suppose I should come to a favorable conclusion, what effect is it going to have on our partnership?" That defendant replied: "The only effect it would have, it will bring in more business, all the business we can attend to. * * * The salary is \$2,000 per year, and \$500 coming in every three months is no little item to be divided; and the salary and tax suits and the business of the criminal cases, together with the civil business that will naturally come to us, will build up a business that will amount to thousands of dollars per year." * * *

Plaintiff says he thought the matter over until the next morning, when he told defendant that he had come to a favorable conclusion; that he then said to defendant that he "had a great many old California friends that lived here, * * * and old Washoe friends, and he thought they would do any thing honorable to advance his interests, irrespective of party principles;" that defendant then said to him: "If we go in for this office and I am to be a candidate, I shall want all my time from now till election." He says he gave him all his time and attended to the business himself; that he let defendant use all the money that they had on hand and all that came into the office, to use for his election. He further testified that he did use all his influence to secure defendant's election, and he stated the reason why he did so, although he said, at last, that there was no agreement that he should do so. The reason he gave why he used all his influence was, that he "supposed he was promoting his own interests." Then, so far as plaintiff was concerned, the incentive that moved him was self-interest and not the general good; and he was induced to do what he did do, too, by the fact that he was to share the profits, and that defendant's election would increase their business. So in this case at least, the tendency of the contract stated in the complaint was to induce plaintiff to use all his influence for defendant's election, even though he did not agree to do so, as found by the court

Gaston v. Drake.

And such was its natural tendency. This arrangement may have induced him to influence ten men, or a hundred, to vote for defendant in opposition to preconceived political principles, and fixed ideas of right and duty; and too, when they may have preferred his opponent as an incumbent of the office. Such a contract cannot be upheld. Its tendency was to corrupt the people upon whose integrity and intelligence the safety of the State and Nation depends — to lead voters to work for individual interests rather than the public welfare. In my opinion, in the majority of cases, men will work as industriously, under an agreement that they shall assist in performing the labors, and share in the profits, of an office, if another is elected, as they would if a promise to use all their influence should be subjoined. With most men, self-interest is among the strongest incentives to effort, and it requires no added promise to act as a stimulating influence.

In *Mood v. McCann*, *supra*, the court said: "There having been no plea or defense in the court below, the only clue to a decision of the case is furnished by the declaration and note as described in it; and had these shown that the fee, or any portion of it, depended on the passage of the legislative acts, or either of them, we should be clearly of the opinion that the contract should be deemed illegal and void; because a contingent fee is a direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature, and therefore public policy forbids the legal recognition of any such contracts, upon the same principle on which it interdicts wagers on elections and contracts for procuring pardons."

And in *Fuller v. Dame*, *supra*, it is said that "the law goes further than merely to annul contracts where the obvious and avowed purpose is to do or cause the doing of unlawful acts; it avoids contracts and promises made with a view to place one under wrong influences — those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons." See authorities before cited. If there are any contracts upon which courts should "put the stamp of their disapprobation," it is those curtailing or tending to curtail a free exercise of the elective franchise. The contract stated in the complaint, as well as that found by the court, was of that character, and neither can be upheld or enforced.

The judgment and order appealed from are therefore reversed, and the court below is directed to enter a judgment of dismissal, defendant to recover his costs.

Judgment reversed.

BEATTY, O. J., concurring. The evidence in this case did not, in my opinion, warrant the finding of the District Court, to the effect that Gaston's promise to use his influence to procure Drake's election was a part of the consideration for the promise of the latter to divide the emoluments of the office. The parties were practicing law in partnership at the time when Drake asked Gaston's advice as to his becoming a candidate for the office of district attorney. Gaston first inquired what effect it would have on their partnership if Drake should be elected. The reply was, in substance, that it would have no other effect than to increase their business by the addition of the business and profits of the district attorney's office.

It was thus definitely settled that in the case of Drake's election their partnership should continue, and should embrace the fees and salary of the office, before a word had been said about Gaston's helping him to win the election, and before it had even been decided that he should run. On the following day Gaston, having weighed the chances of success, advised Drake to come forward as a candidate, and promised his hearty support and assistance. He did assist him to the best of his ability, and frankly stated that one motive for his doing so was his belief that he was thereby advancing his own interests. This is the sum and substance of the testimony, and to my mind it completely fails to show that Drake promised to divide the profits of the office because Gaston promised to help him to get it. What he did was to promise to divide the profits if Gaston would help him perform the duties of the office. If this promise had been made after the election, instead of before the election, it would have been entirely free from any taint of illegality; and if it must be held void and incapable of enforcement, it is not because there is any evidence that Drake expressly bargained for Gaston's influence in aid of his election, but because, and only because, courts are bound to discountenance contracts of this character on account of their tendency to induce the exertion of improper influences upon the election of public officers. Upon this point — the last discussed in the foregoing opinion — I concur in the conclusions and judgment of the court. Upon the others I express no opinion.

State v. Hallock.

STATE V. HALLOCK.

(14 Nev. 202.)

Constitutional law — State poor asylum.

Where the State Constitution declares that the counties shall respectively provide for their paupers, an act to establish and maintain a State asylum for the poor and maimed of the State is not warranted by a constitutional provision for "institutions for the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require."

PETITION for mandamus. The opinion states the case.

R. H. Taylor and *H. R. Whitehill*, for relators. The contemplated asylum is an institution required by the public good. The legislative *dictum* upon that subject shuts out all debate. The court must look to the words of the instrument, and say *ita lex scripta est*. *People v. Morrell*, 21 Wend. 584; *State v. Scott*, 9 Ark. 276; 1 Story on Const., § 425; *Holman Heirs v. Bk. of Norfolk*, 12 Ala. (E. S.) 418; *Maize v. State*, 4 Ind. 344; *Com. v. McWilliams*, 11 Penn. St. 70; *Bourland v. Hildreth*, 26 Cal. 180; *Stock. & V. R. R. Co. v. Stockton*, 41 id. 158. All presumptions are in favor of the validity of legislative enactments. *State v. Brennan's Liquors*, 25 Conn. 288; *Hartford Br. Co. v. Union Ferry Co.*, 29 id. 227; *Maize v. State*, 4 Ind. 344; *Brown v. Buzan*, 24 id. 196; *Groesch v. State*, 42 id. 547; *Lucas v. Commissioners Tip. Co.*, 44 id. 530; *Taylor v. Flint*, 35 Ga. 124; *Armstrong v. Jones*, 34 id. 309; *Adam v. Howe*, 14 Mass. 340; 7 Am. Dec. 216; *Ex parte McCollom*, 1 Cow. 564; *Clark v. People*, 26 Wend. 605; *Newell v. People*, 7 N. Y. 109; *Lane v. Dorman*, 3 Scam. 240; *Emerick v. Harris*, 1 Binn. 416; *Com. v. Smith*, 4 id. 123; *Com. v. McWilliams*, 11 Penn. St. 70; *Farmers and Mec. Bank v. Smith*, 3 S. & R. 73; *Fletcher v. Peck*, 6 Cr. 128; *Gibbons v. Ogden*, 9 Wheat. 187; *Hobart v. Sup. Butte Co.*, 17 Cal. 30; *Stock. & Vis. R. R. Co. v. Stockton*, 41 id. 159; *Ash v. Parkinson*, 5 Nev. 35.

M. A. Murphy, attorney-general, for respondent.

BEATTY, C. J. This is a petition for a writ of mandamus to compel the respondent, who is State controller, to draw his warrant

The substance of the argument on this point, if we have correctly apprehended it, is as follows: The passage of the act in question is equivalent to a solemn declaration by the legislature that a State asylum for the poor of the State is a benevolent institution which the public good requires; such declaration by the legislature is conclusive upon the courts; therefore this is an institution which the State is enjoined by section 1 to foster and support, and consequently section 3 must receive some construction which will not defeat the legitimate operation of section 1, to which this act simply gives effect.

It is a mistake, however, to assume that the judgment of the legislature, no matter how deliberately or solemnly expressed, that a State asylum for the poor is an institution required by the public good, is conclusive upon any one, if it is true that the people have declared in the Constitution that the public good requires paupers to be supported by their respective counties. And since it is clear that such a declaration has been incorporated into the fundamental law, the whole argument, based upon the conclusiveness of the legislative declaration, falls to the ground. In this view the two sections have a perfectly harmonious operation. The State is enjoined by section 1 to foster and support institutions for the public good. By section 3 it is declared that the public good requires paupers to be supported by their respective counties; the case of paupers is specifically excepted from the rule in relation to other classes of unfortunates.

There is also another view in which the two sections may be perfectly reconciled. Institutions for the insane, deaf and dumb, and blind are required by the public good in a sense wholly different from any in which asylums for paupers can be said to be for the public good. Society looks to no ulterior or contingent advantage from the support of the poor. They are supported for their own good exclusively, and simply because humanity impels us to relieve their necessities. It is different with respect to the insane, the deaf and dumb, and blind. If an insane man is restored to his reason by treatment in an asylum, there is a positive gain to the community; if he is incurable, there is a negative advantage to the public in keeping him under restraint, and so preventing him from doing mischief. The blind and deaf and dumb may be educated and trained in institutions specially adapted for the purpose into useful and self-supporting citizens—a double advantage to the commu-

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nity, in making them contributors to the general good, instead of leaving them as a burden on others. Institutions founded with these objects are, therefore, in an emphatic sense, for the public good, as contradistinguished from the good of mere objects of charity. The State orphans' home is an instance of this sort of institution. The object in that case is not merely to clothe and feed the orphan children — the wards of the State — but to rescue them from the dangers of neglect, to educate them and make them useful members of society, instead of exposing them to the dangers of falling into the class of depredators and malefactors.

It thus appears that there are two distinct views in which sections 1 and 3 of article 13 are perfectly harmonious; but there is no possible interpretation of the latter which will harmonize with this act.

[Omitting a minor point.]

Petition dismissed.

STATE V. DAVIS.

(14 Nev. 439.)

Criminal law — escape — unhealthful jail.

It is no defense to an indictment for escape, that the jail was unhealthful and filthy.*

CONVICTION of escape. The opinion states the facts.

N. Soderberg, for appellant. Defendant had a right to show, in mitigation and defense, that an absolute necessity for his leaving the jail existed. It was for the jury to decide whether the facts were sufficient to justify. It was error to exclude the testimony as to the filthy and unwholesome condition of the jail. This testimony was also material as to the question of intent with which defendant left the jail. 1 Comp. Laws, 2307-8; *State v. Gardner*, 5 Nev. 377; 37 Tex. 338; Bish. Cr. L. 370.

M. A. Murphy, attorney-general, for respondent.

* Compare *State v. Lewis* (19 Kans. 200), 27 Am. Rep. 113; *Stuart v. Supervisors* (83 Ill. 241), 25 Am. Rep. 297.

LEONARD, J. Appellant was convicted of the crime of escape from the jail of Ormsby county, when lawfully confined therein upon a charge of felony. This appeal is taken from the judgment, from the order overruling appellant's motion in arrest of judgment, and from an order denying his motion for a new trial.

[Omitting other questions.]

The court refused to permit Hart, witness for appellant, to answer the following question :

“ What was the condition of the jail on and before the twentieth day of March last (the date of the alleged escape), as to whether it was a filthy, unwholesome, and loathsome place, full of vermin and uncleanness, or was it a clean, properly-kept institution? ”

Counsel stated that he asked the question “ for the purpose of showing that defendant had been confined in the jail a long time ; that the condition of the jail during that time and on the 20th day of March, 1879, was absolutely intolerable and injurious to the health of the defendant. This testimony is offered in excuse and in mitigation of the defendant's leaving the jail, and to show an absolute necessity of his leaving.”

Counsel offered to prove the above state of facts by witness Hart and others. Without stating other reasons in support of the court's action, it is enough to say that appellant admitted leaving the jail. By the means employed he gained his liberty before he was delivered by the course of the law. In other words, he intentionally escaped from the jail, and in justification offered the testimony of Hart and others in relation to its condition. Appellant said in substance : “ When legally confined in jail upon a charge of felony I escaped, but the condition of the jail was such that I was under the necessity of doing so.” We consider it unnecessary to decide whether or not the proposed testimony would have been admissible in justification had a proper foundation been laid therefor, that is to say, had appellant shown or offered to show that he exhausted the lawful means of relief in his power before attempting the course pursued. It was not shown or claimed that he had even complained to the sheriff or the board of county commissioners, or that he had endeavored to obtain relief by any lawful means. The plea of necessity in justification of acts, which, without such necessity, constituted the crime charged, was unavailable without also showing that lawful measures had first been adopted to accomplish the desired result. A person confined by the law should be delivered by

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the law ; and no other means can be justified in any case, until the officers in charge, and the law, refuse him relief ; and then the evidence of the necessity must be clear and conclusive, and the act must proceed no further than the emergency absolutely requires. 1 Bish. C. L., § 352.

The necessity, to excuse, must be real and urgent, and not created by the fault or carelessness of him who pleads it. "Where the law," observes STORY, J., "imposes a prohibition, it is not left to the discretion of the citizen to comply or not ; he is bound to do everything in his power to avoid an infringement of it. The necessity which will excuse him for a breach must be instant and imminent ; it must be such as leaves him without hope by ordinary means to comply with the requisitions of the law. It must be such, at least, as cannot allow a different course without the greatest jeopardy of life and property. He is not permitted, as in cases of insurance, to seek a port to repair, merely because it is the most convenient, and the most for the interest of the parties concerned. He is, on the contrary, bound to seek the port of safety which first presents itself, if it be one where he may go without violation of the law. In a word, there must be, if not a physical, at least a moral, necessity to authorize the deviation. Under such circumstances the party acts at his peril ; if there be any negligence or want of caution, any difficulty or danger which ordinary intrepidity might resist or overcome, or any innocent course which ordinary skill might adopt or pursue, the party cannot be held guiltless, who, under such circumstances, shelters himself behind the plea of necessity." Id., § 352.

The court did not err in rejecting the evidence offered in relation to the condition of the jail.

[Omitting other points.]

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

CHIPMAN V. PALMER.

(77 N. Y. 51.)

Nuisance — by several — liability of each.

In an action of nuisance against several acting independently in polluting a stream by the discharge of sewerage from the premises of each, each is liable only to the extent of the separate injury committed by him.*

ACTION of damages for nuisance. The plaintiff kept a boarding-house in Saratoga Springs, near a natural stream of water. Defendant kept one higher up the stream, the sewerage therefrom running into the stream. Sewerage from a large number of hotels and other boarding-houses also ran into the stream above the plaintiff's premises. The water of the stream thereby became corrupt and offensive, and some of the plaintiff's boarders left him on account of the stench.

The court charged the jury that they could not hold the defendant liable beyond the extent of the wrong which he had himself done; that if sewage from private houses and hotels had contributed to produce the damage, the jury might apportionate it, and the rule of damages was the rental value. The plaintiff had judgment below, and appealed.

*See *Blaisdell v. Stephens*, ante, p. 523.

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Oscar Frisbie, for appellant. The defendant was liable for all the damages sustained. *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628; *Webster v. Hudson R. R. Co.*, 38 id. 260; *Chapman v. New Haven R. R. Co.*, 19 id. 341; *Colegrove v. Har. and N. H. R. Co.*, 20 id. 592; 29 id. 591; 14 Johns. 426; Wood's Law of Nuisances, §§ 821-822; id., § 862.

Charles S. Lester, for respondent.

MILLER, J. The charge of the judge upon the trial in reference to the damages embraced two propositions: First, that the defendant was not liable beyond the extent of the wrong which he had committed, nor for the injury which other parties had contributed to produce; and second, that as to the amount of injury, the rental value of the premises was the true test. A general exception was taken to this portion of the charge.

The first proposition contained in the charge was clearly correct. The right of the plaintiff to recover of the defendant all the damages which he had sustained by reason of the nuisance I think cannot be maintained. The injury was not caused by the act of the defendant alone, or by that of others who were acting jointly or in concert with the defendant. It was occasioned by the discharge of sewerage from the premises of the defendant and other owners of lots into the creek separately and independently of each other. The right of action arises from the discharge into the stream, and the nuisance is only a consequence of the act. The liability commences with the act of the defendant upon his own premises, and this act was separate and independent of and without any regard to the act of others. The defendant's act, being several when it was committed, cannot be made joint because of the consequences which followed in connection with others who had done the same or a similar act. It is true, that it is difficult to separate the injury; but that furnishes no reason why one *tortfeasor* should be liable for the act of others who have no association and do not act in concert with him. If the law was otherwise, the one who did the least might be made liable for the damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution or to adjust the amount among different parties. So also proof of an act committed by one person would entitle the plaintiff to recover for all the damages sustained by the acts

of others, who severally and independently may have contributed to the injury. Such a rule cannot be upheld upon any sound principle of law. The fact that it is difficult to separate the injury done by each one from the others furnishes no reason for holding that one *tortfeasor* should be liable for the acts of others with whom he is not acting in concert. The authorities relied upon to sustain such a doctrine come far short of establishing any such rule, and have no application. *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628; *Webster v. H. R. R. Co.*, 38 id. 260; *Sheridan v. B. & N. R. R. Co.*, 36 id. 39; *Chapman v. N. H. R. R. Co.*, 19 id. 341; *Colegrove v. N. Y. and H. and N. Y. and N. H. R. R. Co.*, 20 id. 492; *Creed v. Hartman*, 29 id. 591. Each of the cases cited was disposed of upon a different principle. They merely hold that where a direct personal injury is occasioned by the separate and concurring negligence of two parties at one and the same time, an action against one or all of them will lie. The distinction is plain between the cases last cited and one where the injury is remote from the act and consequential, and the result of separate acts of different parties at different times, without any association and independent of each other. *Slater v. Mersereau*, 64 N. Y. 138, was a case where the separate and independent acts of negligence of two parties was the cause of a single injury to a third person, and as was said in the opinion, was somewhat analogous to a case where the injury was caused by the concurrent negligence of the trains of two railroad corporations. That case was well decided, and in no way upholds the doctrine contended for by the plaintiff's counsel, and is not in point.

The appellant's counsel cites from Wood on Nuisances (§§ 821, 822), claiming that the text upholds the doctrine that where one contributes to the production of a nuisance, he is chargeable with all the damages, although many others contributed thereto; and that where several persons drain in the same ditch, and an injury is produced thereby, any of the persons so using the drain are liable jointly or separately. The cases cited by the author do not sustain the principle contended for, as will be seen by an examination of the same. In *Duke of Buccleugh v. Coman*, 5 Macph. 214, the action was a declaration of interdict in the Court of Sessions of Scotland, which is in the nature of a bill in equity, to prevent the pollution of the river North Esk, which flowed through the lands of the complainants, by paper mills erected on the stream by the

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defendants. It was held that the action could be maintained; that no question of damage was raised, but merely the question whether the parties had committed the nuisance sought to be redressed. While an action in equity may be maintained in favor of different parties, who were the owners of property upon the same stream, against the owners of different properties, to restrain the nuisance, they may not be jointly or severally liable for the entire injury occasioned thereby. In *Crossley v. Lightowler*, L. R., 3 Eq. 279, it was held that it was no answer to plaintiff's complaining of a private nuisance that a great many other persons are committing the same sort of nuisance, and that plaintiff has admitted the fact by buying up the rights of some who had acquired rights against him, provided that a definite amount of injury could be traced to the defendant. This case also was a bill in equity to restrain the defendants from suffering the foul water from their dye-works to flow into and foul the water of the stream and thus interfering with the plaintiff's enjoyment and use of the water. There was no question as to a separate or joint liability for damages in the case. *Thorpe v. Brumfitt*, L. R., 8 Ch. App. 650, was a bill for an injunction to restrain defendants from obstructing a road-way, and holds that the acts of several persons may together constitute a nuisance which the court will restrain, although the damages occasioned by the acts of any one if taken alone, would be inappreciable. *Mc Auley v. Roberts*, 13 Grant's Ch. (U. C.) 565, holds that an injunction will lie to compel defendant to stop or divert a drain which had been built on the plaintiff's lot. In *Chenango Bridge Co. v. Lewis*, 63 Barb. 111, the erection and the illegal use of the bridge afterward was a continuous act; and hence it was properly held that the liability attached not only to those who were engaged in the use, but also to those who erected the structure with the knowledge or intent that it should be put to the illegal use. None of these cases uphold the doctrine contended for.

While as we have seen, an equitable action will lie to restrain parties who severally contribute to a nuisance, the general rule is well settled that where different parties are engaged in polluting or obstructing a stream, at different times and places, the whole damages occasioned by such wrongful acts cannot be collected of one of the parties. This was also distinctly held in *Wallace v. Drew*, 59 Barb. 413. There must be concert of action and co-operation to make several persons jointly liable. *Williams v. Sheldon*, 10 Wend.

654; *Guille v. Swan*, 19 Johns. 381. In *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 217, which was a motion for an injunction to prevent the pollution of a stream by dye-wares and matters of that description, the vice-chancellor states that where one wrong-doer does more harm than another by a separate act, "the plaintiff must pursue each of the wrong-doers separately, unless they are acting in partnership or in concert together, as they are separate acts." The same rule is upheld in the State of Pennsylvania in several cases where the question was presented. *Little Schuylkill Nav. R. R. and Coal Co. v. Richards*, 57 Penn. 142; *Seeley v. Alden*, 61 id. 302; *Bard v. Yohn*, 26 id. 482.

[Omitting minor matters.]

As no error appears to have been committed upon the trial, the judgment should be affirmed.

Judgment affirmed.

All concur.

DUNHAM V. BOWER.

(77 N.Y. 76.)

Judgment — former — when a bar.

An action by the owner of goods against a carrier, for damages for failure to transport such goods, is barred by a previous judgment in favor of the carrier against the owner for the freight of such goods.

ACTION of damages for loss of goods intrusted for carriage by canal from Watkins to the city of New York. The boat was stopped by ice at Ilion. The defendant gave in evidence a judgment recovered by him in a justice's court for the freight from Watkins to Ilion. The opinion states other facts. The defendant had judgment below.

Nathaniel C. Moak, for appellant. Plaintiff was not legally bound to set up his claim for damages as a defense or counter-claim in the justice's court. 2 R. S. 234, § 50, subs. 3 and 5; 2 Edm. Stat. 250; 2 R. S. 236, § 58, sub. 1; 2 Edm. Stat. 252; *Borth v. Burt*, 43 Barb. 628; *Batterman v. Pierce*, 3 Hill, 171; *Simeon v. Schenck*, 29 N. Y. 598, affirming 33 Barb. 9; *Gillespie v. Torrance*, 25 N. Y. 306,

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affirming 4 Bosw. 36; *Joes v. Van Epps*, 22 Wend. 157; *Batterman v. Pierce*, 3 Hill, 171; *Britton v. Turner*, 6 N. H. 481; *Halsey v. Carter*, 1 Duer, 667; *Barber v. Rose*, 5 Hill, 81; *Stever v. Lamoure*, Lalor's Supp. 352, note a.

Erastus P. Hart, for respondent.

CHURCH, C. J. The only question presented in this case is whether the judgment in favor of the defendant against the plaintiff for the freight in transporting the apples from Watkins to Ilion is a bar to the plaintiff's claim in this action.

This action is brought upon the contract to transport the apples from Watkins to New York, by which it is alleged that the defendant agreed to start on the 8th of November, and that he did not start until the 12th, by reason of which the apples were frozen, and destroyed.

A judgment or decree of a court having jurisdiction of the subject-matter, and of the parties, is, as a general rule, final and conclusive as to the matters actually litigated and decided, and also as to the matters necessarily involved in the litigation, and which might have been litigated. *Embury v. Conner*, 3 N. Y. 511, and cases cited; *Collins v. Bennett*, 46 id. 490. Whenever recoupment is sought, the party entitled to it may interpose it as a defense, or bring a cross action, and in general, it is optional with him which course he will adopt. *Gillespie v. Torrance*, 25 N. Y. 309. This proceeds upon the ground that recoupment is in effect the setting off of distinct causes of action. It is sometimes difficult to draw the line between a judgment which will operate as a bar to an action for a specified claim, and one which leaves the claim outstanding to be enforced by a cross action. It depends in a great measure upon the nature of the demand litigated, the relation which the claim sought to be enforced bears to it, and the circumstances attending it. Any fact or allegation which is expressly or impliedly involved in a judgment is merged in it, and cannot again be litigated. Upon this principle the so-called malpractice cases were decided. *Gates v. Preston*, 41 N. Y. 113; *Bellinger v. Craigue*, 31 Barb. 534, and which have been approved in the recent case of *Blair v. Bartlett*, 75 N. Y. 150; s. c., 31 Am. Rep. 455. It was held in these cases that the question of care and skill of a physician, or surgeon, is necessarily adjudicated in an action to recover com-

pensation for the services rendered, and a judgment for such services is a bar to an action for damages, based upon a want of proper care and skill. So in *Collins v. Bennett*, 46 N. Y. 490, it was held that a judgment in an action to recover compensation for keeping a horse, was a bar to an action for a conversion of the horse founded upon using and driving him contrary to the agreement, upon the ground that the recovery necessarily adjudged a performance of the contract. I think that the principle decided in that case applies here. The action for freight in transporting the apples adjudged that the plaintiff in that action had performed his contract, except to the extent that he was excused by the freezing of the canal. It is urged that the cause of action in this case was independent of the contract of shipment. It seems quite clear that it was a part, and a very essential part of that contract. The time of starting was made important by the parties, and a violation of the agreement in that respect caused, as it is alleged, the freezing and destruction of the property transported. If this had been shown, it would have defeated the whole cause of action before the justice of the peace, either upon the contract, or upon a *quantum meruit*. It would have shown that the pretended service was of no value, and after defeating that action the defendant would have been at liberty to have sued for his damages.

If the allegations in this case are true, the defendant was not only not entitled to any freight, but the plaintiff was entitled to a judgment for the whole amount of his damages. I do not see how a right to freight and a right to damages for the destruction of the whole property caused by a violation of the shipping contract can co-exist.

When property has been accepted by the owner, although in a damaged condition, a different question is presented. Lord MANSFIELD, in such a case, said: "As to the value of the goods, it is nothing to the master whether the goods are spoiled or not, provided the merchant takes them; it is enough if the master has carried them, for by doing so he has earned his freight, and the merchant shall be obliged to take all that are saved, or none, he shall not take some, and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged." * * * "If he abandons, he is excused freight, and he may abandon although they are not all lost." *Dakin v. Oxley*, 33 L. J. (C. P.) 115, 119. This was clearly a case

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where the owner was "excused freight," not merely because the goods were damaged, but because they were destroyed by the violation of the contract of shipment. The defense would go to the whole cause of action, and hence might be proved under the general issue. *Gleason v. Clark*, 9 Cow. 57.

Another aspect of the case is more clearly fatal to the plaintiff on this point. The contract was to transport the apples to New York. The defendant transported them only half way, alleging the freezing of the canal as "an act of God," as an excuse. The violation of the agreement to start on the eighth would have been an answer to the excuse, and he would have occupied the same position as he would if the freezing had not occurred, which would have been that of one claiming freight under an agreement to transport property to New York, when he had left it a hundred miles away. A recovery could not be had for freight in such a case, irrespective of the injury to property. Carriers must, like other persons, perform their contracts, and to recover compensation for such performance, they must show performance.

The judgment in this case established a performance, except as excused. Put the tests as stated by the learned judge who delivered a dissenting opinion below: "Suppose that when the present defendant had sued for his freight, it had been shown that he did not start until four days after the day when he had agreed to start, would that have been fatal to the action?" I think it would, because it would have answered the excuse of stoppage by act of God.

Here, confessedly, the defendant failed to perform his contract, and such performance is a condition precedent to his right to freight. He pleads the act of God as an excuse. Is it not an answer that he encountered such act by violating his agreement, or in other words, by his own fault?

There may be cases where the principle of recoupment would apply, but does it apply when the fact upon which it is alleged is necessarily fatal to the whole action? I think not. We must decide this case upon its own facts, and it seems to us that if the allegations of the complaint in this case are true, the defendant could not have legally recovered for freight, and this whether damages ensued or not to the property. The recovery therefore adjudicated either that the defendant never made the alleged agreement.

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or that he had performed it. These questions were necessarily involved in that action, and are merged in the judgment.

The judgment must be affirmed.

Judgment affirmed.

All concur.

RING V. CITY OF COHOES.

(77 N. Y. 83.)

Negligence — contributory — concurring causes.

The plaintiff was driving a blind horse and a wagon on one of defendant's streets; the horse becoming frightened, ran away, and was turned by a heap of ashes, negligently suffered in the street, into the gutter, where the wagon struck against the nozzle of a city hydrant projecting four inches over the gutter, and was overturned, and the plaintiff was injured. *Held*, (1) that the running away of the horse would not prevent a recovery; (2) that in the absence of evidence that the hydrant was improperly placed, negligence could not be presumed from its position and construction; (3) that in the absence of a finding that the accident was caused by the heap of ashes no recovery could be based on the negligence in suffering it to accumulate in the street.

ACTION of damages. The opinion states the facts. The plaintiff had judgment below.

Samuel Hand, for appellant.

Nathaniel C. Moak, for respondent. The defendant was guilty of such negligence as rendered it liable for injuries resulting from the defective condition of the street. *Chicago v. Brophy*, 2 L. & Eq. 224; *Macauley v. Mayor*, 67 N. Y. 602; *Kennedy v. Mayor*, 17 Alb. L. J. 454; *Titus v. Inhabitants, etc.*, 97 Mass. 258; *Stone v. Hubbardston*, 100 id. 54, 55; *Nichols v. Town of Brunswick*, 3 Cliff. 81; *Toms v. Whitby*, 37 U. C. (Q. B.) 107; 35 id. 226; *Baldwin v. Turnpike Co.*, 40 Conn. 236; s. c., 16 Am. Rep. 33; *House v. Fulton*, 29 Wis. 306, 307; *Hull v. City of Kansas*, 54 Mo. 601; s. c., 16 Am. Rep. 33. Even if the driver had lost control of his horse, defendant is liable if the defect in the street was the immediate cause of injury. *Baldwin v. Greenwoods Turnpike Co.*, 40

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Conn. 238-245; s. c., 16 Am. Rep. 33; *Hunt v. Pownal*, 9 Vt. 411; *Lower Macungie Township v. Merkhoffer*, 71 Penn. St. 276; *Hey v. City of Philadelphia*, 81 id. 44; s. c., 22 Am. Rep. 733; *Newlen Town. v. Davis*, 1 Week. Notes, 211; *Pittsburgh v. Grier*, 10 Harris, 54; *Scott v. Hunter*, 10 Wright, 194; *Sherwood v. City of Hamilton*, 37 U. C. (Q. B.) 410; *Tuff v. Warman*, 2 C. B. (N. S.) 740; 5 id. 573; *Witherly v. Regents' Canal Co.*, 12 id. 2; *Gee v. Metro. R. W. Co.*, L. R., 8 Q. B. 161; *Bradley v. Brown*, 32 U. C. 403; *Toms v. Whitby*, 37 id. 100; *Moore v. Inhabitants, etc.*, 32 Me. 46; *Farrar v. Inhabitants, etc.*, id. 574; *Coombs v. Inhabitants, etc.*, 38 id. 204; *Anderson v. City of Bath*, 42 id. 346; *Moulton v. Inhabitants, etc.*, 57 id. 127; *Winship v. Enfield*, 42 N. H. 197; *Clark v. Barrington*, 41 id. 44; *Tucker v. Heuricker*, id. 317; *Norris v. Litchfield*, 35 id. 271; *Hunt v. Town of Pownal*, 9 Vt. 411; *Kelsey v. Town of Glover*, 15 id. 708; *Allen v. Town of Hancock*, 16 id. 230; *Palmer v. Inhabitants, etc.*, 2 Cush. 600; *Murdock v. Inhabitants, etc.*, 4 Gray, 178; *Marble v. City of Worcester*, id. 395; *Rowell v. City of Lowell*, 7 id. 100; *Davis v. Inhabitants, etc.*, 4 Allen, 557; *Titus v. Inhabitants, etc.*, 97 Mass. 258; *Horton v. Taunton*, id. 266; *Fogg v. Nahant*, 98 id. 678; *Withrow's Am. Cases*, 464; *Dreher v. Fitchburg*, 22 Wis. 675; *Houfe v. Town of Fulton*, 29 id. 296; s. c., 9 Am. Rep. 568; *Hull v. City of Kansas*, 54 Mo. 598; s. c., 14 Am. Rep. 487; *Bassett v. City of St. Joseph*, 53 id. 290; s. c., 14 Am. Rep. 446; *Palmer v. Inhabitants*, 2 Cush. 607-609.

EARL, J. A municipal corporation, bound to keep its streets in repair, does not become an insurer of travellers thereon. It is bound to use reasonable skill and diligence in making its streets safe and convenient for travel. It is under no obligation to provide for every thing that may happen upon its streets, but only for such use of them as is ordinary or as may reasonably be expected. It is not bound to keep its streets in such condition that a traveller thereon may with safety run his horses at a furious rate of speed, or safely drive thereon unmanageable horses; neither is it bound to keep its streets in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver and are running away. In Massachusetts, Maine and Wisconsin, it is held that municipal corporations are not bound so to make their roads that travellers shall be safe when their horses are frightened, unmanage-

able or running away. *Moulton v. Inhab. of Sandford*, 51 Me. 127; *Nichols v. Inhab. of Athens*, 66 id. 402; *Perkins v. Inhab. of Fayette*, 68 id. 152; s. c., 28 Am. Rep. 84; *Davis v. Inhab. of Dudley*, 4 Allen, 558; *Titus v. Inhab. of Northbridge*, 97 Mass. 258; *Fogg v. Inhab. of Nahant*, 98 id. 578; *Murdock v. Inhab. of Warwick*, 4 Gray, 178; *Dreher v. Inhab. of Fitchbury*, 22 Wis. 675; *Houfe v. Inhab. of Fulton*, 29 Wis. 296; 9 Am. Rep. 568. In *Titus v. Inhab. of Northbridge*, CHAPMAN, J., said: "When a horse, by reason of fright, disease or viciousness, becomes actually uncontrollable, so that his driver cannot stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable." In such cases, it is said that the conduct of the horse is the primary cause of the accident; that there are two efficient, independent proximate causes, the primary cause being one for which the corporation is not liable, and as to which the traveller himself is in no fault, and the other being a defect in the highway; and hence, that it is impossible to determine that the accident would have happened but for the primary cause. But within the rule laid down in those States, a horse is not to be considered uncontrollable that merely shies, or starts, or is momentarily not controlled by his driver. *Titus v. Inhab. of Northbridge*, *supra*; *Stone v. Inhab. of Hubbardston*, 100 Mass. 54. But in Vermont, New Hampshire, Connecticut, Missouri, Pennsylvania and Upper Canada, a different rule prevails upon this subject. *Baldwin v. Turnpike Co.*, 40 Conn. 238; s. c., 16 Am. Rep. 33; *Hull v. City of Kansas*, 54 Mo. 601; s. c., 14 Am. Rep. 487; *Hunt v. Town of Pownal*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197; *Hey v. City of Philadelphia*, 81 Penn. St. 44; s. c., 22 Am. Rep. 733; *Sherwood v. City of Hamilton*, 37 U. C. (Q. B.) 410. In these States it is held that when an accident happens from a negligent defect in the highway, the fact, that the horse was at the time uncontrollable or running away, furnishes no defense to an action for the injury. In *Baldwin v. Turnpike Co.*, MINOR, J., said: "The failure of a traveller to be continually present with his team up to the time and place of injury when that failure proceeds from some cause entirely beyond his control, and not from any negligence on his part, ought not to impose upon him the loss from such injury, particularly when the direct

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cause of the same is the negligence of some other party ; the loss should be charged upon the party guilty of the first and only negligence with reference to the matter." And in the same case the rule is said to be this : "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable. Nor will the fact that the horse of the plaintiff was uncontrollable for some distance before the injury change or in any way affect the liability of the defendants." When, without any fault of the driver, a horse becomes uncontrollable or runs away, it is regarded as an accidental occurrence for which the driver is not responsible ; and the rule, as laid down in the cases last cited, may be formulated thus: When two causes combine to produce an injury to a traveller upon a highway, both of which are in their nature proximate — the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible — the municipality is liable, provided the injury would not have been sustained but for such defect. This appears to us to be the reasonable rule. It exacts no duty from municipalities which has not always rested upon them. They must use proper care and vigilance to keep their streets and highways in a reasonably safe and convenient condition for travel. This is an absolute duty which they owe to all travellers ; and when the duty is not discharged, and in consequence thereof a traveller is injured, without any fault on his part, they incur liability. They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads ; and if they do not, and a traveller is injured by culpable defects in the road, it is no defense that his horse was at the time running away or was beyond his control.

Now what were the main facts of this case? The plaintiff was driving a blind horse, harnessed to a sleigh, upon one of the streets of the city. The street was thirty feet wide between the curbs. At the place of the accident, on the west side of the street, there was a heap of ashes about twenty feet long, three feet high and extending from the westerly curb into the street about eleven feet, leaving a road-way between the heap of ashes and the easterly curb of about nineteen feet. At the same time, a loaded wagon was coming southerly, next to the heap of ashes, leaving a roadway between that and the easterly curb about twelve feet wide. Plaintiff's

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horse, coming from the south, became frightened and commenced to run; the plaintiff was unable to restrain him, or to guide or direct him with any precision; and after running about five seconds, he ran so near to a hydrant, on the easterly side of the street, opposite the wagon going south, as to strike the nozzle of the same with the cross-bar of the sleigh, and plaintiff was thrown against the hydrant, and sustained the injury complained of in this action. The referee was authorized to find, upon the evidence, that the plaintiff was free from fault; and that the city was in fault for permitting the street to be incumbered with the heap of ashes. His finding upon defendant's negligence is as follows: "The defendant was guilty of negligence in allowing and permitting said pile of ashes and cinders to accumulate and remain in said street, and in erecting and maintaining said hydrant so that the same and the nozzle thereof projected into the portion of the street between the two curbs, and that such negligence contributed to the accident and injury to the plaintiff above described; that by reason of such negligence of the defendant and of such accident and injury to the plaintiff, the plaintiff has suffered damage," etc.

It will be observed that the referee found the defendant negligent, both as to the heap of ashes and the hydrant, and that such negligence contributed to the accident; and he finds against the defendant on account thereof. He based his judgment upon two defects in the street; and how much he was influenced in reaching his conclusion by either, we cannot tell. He certainly erred in finding that the defendant was negligent as to the hydrant. That was of iron, erected by the city in the curb, about eight inches in diameter and two and a half feet high, with a nozzle about six inches from the top, projecting over the gutter about four inches. The gutter was at least a foot wide. There was no evidence that this hydrant was not properly constructed, or that it was not properly placed where it was. It would seem that it could be placed in no position where it would be less inconvenient than in the curb. There it was, as much as possible, out of the way of pedestrians upon the sidewalk and vehicles upon the street. A hydrant answers a useful and necessary purpose, and it is required to be placed somewhere in the street; and when the public authorities determine to place one in the curb, it cannot be said that they have done a negligent act. If so, it would be negligent to permit awning or hitching posts to be placed, or trees to grow on the edge

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of a sidewalk, extending partly, as they frequently do, into the gutter. It is true, that in a city the whole roadway must generally be kept suitable for travel. But the gutter is not properly for travel, it is made for another purpose. The finding, therefore, that the city was negligent as to this hydrant, was without any evidence to support it.

The liability of the city must therefore rest entirely upon the obstruction caused by the heap of ashes. If it carelessly permitted that to remain there, obstructing to some extent the roadway, it would be responsible for any accidents caused by it, but only for such accidents as would not have occurred but for such obstruction. We cannot say, upon the evidence, that that obstruction caused the accident; and the referee has not found that it did. He found that that and the other obstruction, as to which the city was not in fault, did. When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause, unless without its operation the accident would not have happened. We cannot say, from the evidence or the findings of the referee, that the heap of ashes was the cause of the accident, without which it would not have happened.

The referee erred in finding that the city was negligent as to the hydrant; and we cannot say that this error was not harmful to the defendant.

The judgment must therefore be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur.

MATTER OF DODGE AND STEVENSON MANUFACTURING COMPANY.

(77 N. Y. 101.)

Judge — disqualification — kinship to stockholder in corporate party.

Under a statute prohibiting a judge from sitting in a cause where he is related by consanguinity or affinity to either of the parties, a judge is not disqualified from sitting in a proceeding to which a corporation is a party, by his kinship to a stockholder of the corporation.

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THE opinion states the case.

W. F. Cogswell, for appellant.

E. Countryman, for respondents. The orders of Judge DWIGHT were void by reasons of his affinity to several of the stockholders. 2 R. S. 275, marg. p., § 2; 1 Coke Litt., 157 *a*, § 234; Graham's Pr. (2d ed.) 304; 3 Wait's Pr. 105; 2 Graham & W. on New Trials, 228, note 1; *Post v. Black*, 5 Den. 67; *Paddock v. Wells*, 2 Barb. Ch. 331; *People v. Thompson*, 41 N. Y. 1, 5; *Chambers v. Clearwater*, 1 Abb. Ct. of App. 341-346; *Moses v. Julian*, 45 N. H. 52-54; *Stearns v. Wright*, 51 id. 600, 608; *Heydenbelt v. Towns, etc.*, 27 Ala. 424; *People v. De la Guerra*, 24 Cal. 73; *Foot v. Stiles*, 57 N. Y. 399, 408; *Durres v. Grand Junc. Canal*, 3 H. of L. Cas. 759; *Converse v. McArthur*, 17 Barb. 410-412; *Barton v. Fort Jackson*, id. 397-404; *Henry v. Salina Bank*, 1 N. Y. 83, 86, 87; *Bell v. Quin*, 2 Sandf. 153; *Hallett v. Novion*, 14 Johns. 273, 290; *Pennington v. Townsend*, 7 Wend. 276, 280; Sedg. on Stat. and Const. Law, 38, 40, 84, 396; 3 R. S. (6th ed.) 983, § 102; *People v. Bogart*, 3 Abb. 193; 3 Park. Cr. 143; *Oakley v. Aspinwall*, 3 N. Y. 547, 551; *Edwards v. Russell*, 21 Wend. 64; *Schoonmaker v. Clearwater*, 41 Barb. 200-203-206; *Foot v. Morgan*, 1 Hill, 655; *Birdsall v. Fuller*, 11 Hun, 204; *Rivenburgh v. Henness*, 4 Lans. 208; *Baldwin v. McArthur*, 17 Barb. 414; *Jewett v. Albany City Bank*, Clark's Ch. 170; *N. Y. and N. H. R. Co. v. Schuyler*, 28 How. 187; reviser's notes, 3 R. S. (2d ed.) 694; *Say v. Minot*, 3 Cush. 352; *Sigourney v. Libby*, 21 Pick. 101; 22 id. 507; *Bacon, appellant*, 7 Gray, 391; *Stearns v. Wright*, 51 N. Y. 600; *Hawley v. Baldwin*, 19 Conn. 584; *English v. Smith*, 13 id. 221; *Sturges v. Peck*, 12 id. 139; *Bellows v. Pearson*, 19 Johns. 172.

RAPALLO, J. By an order of the Supreme Court at a Special Term held by the Hon. C. C. DWIGHT, one of the justices of that court, on the 15th of June, 1876, Martin S. Cuykendall was appointed receiver of all the property and rights in action of the Dodge and Stevenson Manufacturing Company, including any and all liability of stockholders for unpaid stock, or for the debts of said corporation. On motion of the receiver so appointed, a further order was made at a Special Term held by the same judge on the 21st of July, 1876, directing an assessment upon the stockholders

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of the company liable for the debts thereof, of seventy-five per cent of the amount of stock held by them respectively, and that the receiver collect the same and bring actions, etc.

In pursuance of these orders the receiver made the assessment authorized, and brought actions against various stockholders whom he alleged to be liable upon their stock, for the recovery of the sums assessed upon them respectively.

After the trial of one of those actions, the motion which has given rise to the present appeal was made, on behalf of various stockholders of the company. The motion was to remove Martin S. Cuykendall from his receivership and to appoint a new receiver, and to set aside the order of the 21st of July, 1876, which directed an assessment upon the stockholders, or to modify said order and reduce the assessment to a smaller per centum, and for general relief.

One of the grounds of this motion, and the only one necessary to be considered on this appeal, was that the said orders were improperly granted by a justice of the Supreme Court who was of kin by blood or marriage, within the ninth degree, to one or more of the stockholders of said company, and therefore his orders were illegal and void.

The motion was heard at Special Term before Judge RUMSEY, who made an order refusing to grant the motion on the ground stated, but accepting the resignation of Mr. Cuykendall as receiver, to take effect when another receiver should be appointed, and referring it to a referee to select a new receiver, and also to ascertain and report whether the assessment was larger than necessary, and what proportion thereof should be remitted.

From this order an appeal was taken to the General Term, who reversed it, and vacated and set aside the order appointing the receiver, and the order directing the assessment, and the assessment made in pursuance thereof. This order of the General Term, as amended by stipulation, contains a statement that it is made upon the ground that Mr. Justice DWIGHT was related by marriage, within the ninth degree, to several of the stockholders of the late Dodge and Stevenson Manufacturing Company, and so disqualified from sitting at the hearing of the applications resulting in the orders of the 15th of June, and the 21st of July, 1876.

This decision was based upon the statute (2 R. S. 275, § 2), which declares, that "no judge can sit as such in any cause to

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which he is a party, or in which he is interested, or in which he would be excluded from being a juror, by reason of consanguinity or affinity to either of the parties." The question now before us consequently is, whether the case falls within the prohibition of this statute. If it should be found to be within the statute, the further question would remain, whether the orders are merely voidable, or whether they are absolutely void, so that all proceedings had under them are also void, and the actions brought by the receiver must fail for that reason.

To bring this case within the statute it is necessary to establish that the orders were made in a cause, and that the persons to whom Judge DWIGHT is related were parties to that cause. Both of these points are contested by the appellant. In considering them we will first examine the case of the order appointing a receiver.

That order was not made in any action, but upon an application to the court pursuant to a special statute. The Dodge and Stevenson Manufacturing Company was a corporation organized in Cayuga county under the general manufacturing law. By an act passed in 1852 (chapter 361 of the Laws of 1852) in relation to manufacturing corporations in Herkimer county (and afterward by chapter 179 of the Laws of 1853 made applicable to like corporations in the county of Cayuga) it is provided (§ 1) that whenever the trustees of any such company shall become satisfied that its assets are insufficient to pay its debts, and that its business cannot be carried on without loss, they may by resolution so declare, and thereupon the corporation shall become dissolved and all its property and rights in action, including any liability of the stockholders for unpaid stock, or for the debts of the corporation, shall thenceforth be deemed the property of the creditors, to the extent of their debts, in equal ratio, according to their debts respectively. By § 3, it is declared that the trustees then in office shall become trustees for the creditors to the extent of the debts, and for the stockholders for any surplus, and they are required to close the business, dispose of the property, collect the debts due to the corporation and pay those owing by it; to assess deficiencies, if necessary, upon the stockholders, to the extent of their liability, or distribute any surplus among them. These trustees are also declared to be subject, as such trustees, to the control and direction of the Supreme Court, upon their own application, or that of any creditor, and removable by the same court, which is

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authorized to appoint a receiver in their place upon proper cause shown.

In pursuance of this act the trustees of the company in office on the 31st of August, 1874, passed the resolutions required to dissolve the corporation, and thus become trustees of its property and rights in action under the act, and afterward proceeded to wind up its affairs.

In May, 1876, they presented a petition to the Supreme Court setting forth their proceedings as trustees, together with their accounts, and praying that their accounts might be passed, settled and allowed, and that they might be removed and discharged from their trust, and that a receiver might be appointed in their place.

This proceeding appears to have been wholly *ex parte*, and it is stated in the papers on which the present motion was made, that no notice of the application of the trustees was given to any of the stockholders.

This is the application which was heard by Judge DWIGHT and which is alleged to be the cause in which he was disqualified from sitting, by reason of his relationship to some of the stockholders. It is true that at the same time a petition, on behalf of some creditors of the company, for the appointment of a receiver and an accounting by the trustees, was presented to the court, but this petition seems to have been in aid of that of the trustees, the same counsel appearing for all the petitioners, and no notice having been given to any adverse party.

It is contended by the appellant that this *ex parte* application was not a cause. We are not inclined to give that term a narrow construction in cases which are within the spirit of the statute now in question, but rather to hold that when a judge is interested in any matter brought before him it should be deemed a cause within the intent of that portion of the statute which disqualifies him from sitting by reason of his interest. But it is difficult to apply to such a proceeding the further provision, which declares him incompetent to sit in any cause in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties. This language does not seem appropriate to such a case as the present, but rather to a case where there are parties adverse to each other, or at least where some question is to be determined between two or more parties. But passing this question, it is very

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certain that to exclude a judge from sitting in any cause by reason of kinship, such kinship must exist between him and some person who is actually a party to the cause. It is not enough that he is related to some person, not a party, who is or may be interested in it, or affected by his order. Interest on the part of the judge disqualifies him from sitting, but interest on the part of a relative of the judge does not. The statute very clearly expresses that such relative must be one of the parties to the cause, to render the judge incompetent. The case of an action by or against a corporation is an apt illustration. If the judge is a stockholder of the corporation, he cannot sit, because he is interested. That was the case in *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759. But the fact of a relative of a judge within the prohibited degree being a stockholder of the corporation, does not disqualify the judge, because such stockholder, though interested, is not a party. In *Place v. Butternuts Manufacturing Company*, 28 Barb. 503, a judgment of a justice of the peace against a corporation, affirmed by the county court, was reversed by the Supreme Court, on the ground that a brother of the justice was a stockholder of the company defendant; but the judgment of the Supreme Court was in turn reversed by the Court of Appeals in December, 1863, and the judgment of the county court was affirmed. The case is not reported, but the decision is among the list of decisions in 26 How. Pr. 601, and is referred to in Moak's edition of Clark's Chancery, note, page 191, and the cause of its not being reported is there explained. The same point was adjudged in *Bank of Lansingburg v. McKie*, 7 How. 360. I do not understand it to be now claimed that relationship to a person interested in the event of a cause disqualifies a judge from sitting, if such relative is not a party. The only question on which there was any conflict of authority was whether a stockholder is a party to an action against the corporation. Chancellor KENT, after conference with Chief Justice SPENCER, held in *Stuart v. Mechanics & Farmers' Bank*, 19 Johns. 501, that he was not, while Vice-Chancellor SANDFORD held in *Wash. Ins. Co. v. Price*, 1 Hopk. 1, that he was. This decision probably resulted from a feeling of delicacy on the part of the chancellor, who was called upon to hear a cause against a corporation in which he was himself a stockholder. The statute then provided that where the chancellor should be a party to a suit in chancery, the bill should be filed before the chief justice of the State who should proceed in the cause as chancellor. Chancellor

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KENT had previously (19 Johns. 501) held that he was bound to hear similar cause, on the ground that he was not a party, but Vice-Chancellor SANDFORD declined to follow his decision. This difference was afterward settled by the provisions embodied in 2 Revised Statutes, page 169, § 7 and page 178, § 64, which furnish a substitute for the action of the chancellor in cases where he is either a party or interested. And the question whether a stockholder is a party to a cause in which the corporation is a party was settled by this court in *Place v. Butternuts Manuf. Co.*, before referred to. Judgments and proceedings of our courts against corporations would stand upon a very precarious foundation in these days, if they could be overturned on discovering that some judge who took part in them was related within the ninth degree by blood or marriage to some stockholder of the corporation. If such were the law it would be extremely difficult for most of our judges to know whether they were competent to sit, in cases in which some of our large corporations are parties.

In the proceeding now under review, viz., the application of the trustees to have their accounts passed, and for the appointment of a receiver in their place, it is not in my judgment possible to say that the stockholders of the company were parties. The statute did not require them to be brought into court, and they were not in fact brought into court in any manner, nor were they named in the proceeding. The trustees were the only parties appearing before the court, unless it be the creditors who presented their auxiliary petition. The trustees invoked the action of the court in pursuance of the act of 1852, chapter 361, section 3, before referred to, which declared them to be subject to the control and direction of the Supreme Court, on their own application or that of any creditor, and empowered that court to appoint a receiver in their place on proper cause shown. The law did not require that the stockholders be parties to the proceeding. It is true, the stockholders had an interest in the matter, by reason of the possibility of a surplus, and also because the receiver to be appointed would have the power to assess and sue them if they were liable on their stock, but as has already been shown, interest on the part of a relative of the judge does not disqualify him from sitting; the relative must be actually a party to the cause. It would be almost impossible to carry on the administration of justice under any different rule. The judge may be presumed to know whether he is himself in-

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interested in a cause brought before him, and he can ascertain from the papers who are the parties to it, and presumably may know whether any of them are related to him by blood or marriage within the ninth degree; but how can he possibly know what persons, not named, may be interested in the subject, or whether any such persons are related to him? The law is not so unreasonable as to make the validity of his action depend upon such a question. It carefully guards not only against actual abuses, but even against the appearance of evil, from which doubt can justly be cast upon the impartiality of judges, or respect for their decisions may be impaired; but enactments intended for this purpose should not be extended beyond their letter and spirit, so as to be perverted into snares for litigants, and to cast uncertainty upon all rights acquired under judicial proceedings. If the decision which we are called upon to review here is sound, there can hardly be a title acquired under a receiver of a dissolved or insolvent corporation, which cannot be overthrown by showing that among the stockholders, unnamed in the proceedings, was some distant relative of the judge who appointed the receiver, or under whose orders the receiver has acted. The consequences which would flow from such a doctrine are too obvious to need illustration, and too serious to render the doctrine tolerable.

We think it clear that the stockholders who were related to Judge DWIGHT were not parties to the proceeding in which the receiver was appointed and that his order therein was valid and effectual.

The validity of the assessment is equally evident. In the first place no order was necessary to authorize the receiver to assess. The act confers directly upon the trustees power to assess deficiencies, if necessary, upon the stockholders, to the extent of their liability, and it requires no previous application to the court. The trustees are subject to the control and direction of the court, and they are authorized to apply to it for instructions, but they are not required to obtain its leave to do the numerous acts which they are empowered by the statute to perform. The receiver succeeded to the powers of the trustees, and although out of abundant caution he applied for directions to make the assessment, yet even if he failed to obtain a valid order for that purpose, he was not thereby deprived of the power to assess, vested in him by the statute, so long as no valid order was made restraining him from the exercise of that power. But we do not rest our decision upon that ground alone.

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The order for the assessment was an *ex parte* order, made on the petition of the receiver for directions, and the moving papers in this case state that no notice of this application was given to any stockholder. It is difficult to see how on such an application any person other than the receiver can be deemed a party within the statute. There would be equal reason for holding that on an *ex parte* application of a receiver to the court for directions, as to bringing actions to collect the debts due to an insolvent corporation, the debtors were parties, and that if the judge happened to be related to any debtor to the corporation, though not even named in the proceeding, his order was void.

I have examined every case cited on the brief of the learned counsel for the respondent bearing upon the question and have not found one which holds that the relationship of the judge to a person not an actual party to the proceedings, though interested therein, is a ground of disqualification of the judge, unless *Foot v. Morgan*, 1 Hill, 654, should be regarded as sustaining that view. All but two of the cases cited were regular actions in which the judge was related to a party plaintiff or defendant. Those two are *Baldwin v. McArthur*, 17 Barb. 415, and *Rivenburgh v. Henness*, 4 Lans. 208. In the first, which was a proceeding in a case of pauperism, the overseer making the application was a member, and a necessary constituent part, of the court to which it was made; he was therefore both party and judge; and in the second, a bastardy case, the complainant (likewise an overseer) was a relative of the magistrate before whom the proceedings were instituted. He was clearly a party on the record. In *Foot v. Morgan*, 1 Hill, 654, referred to above, Morgan had prosecuted an action for his own benefit in the name of a merely nominal plaintiff, before a justice of the peace to whom he was related, and had obtained judgment thereon against Foot. He afterward moved to set off that judgment against a judgment which Foot had obtained against him in the Supreme Court, and it was held that the statute applied to such a case and rendered the justice's judgment void. That is the only case cited in support of the proposition that relationship to any person other than a party to the record disqualifies the judge. But it is very far from controlling the present case. It was mainly upon the authority of that case that the decision of the Supreme Court in *Place v. Butternuts Manufacturing Company*, 28 Barb. 503, rested.

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It is worthy of observation that at common law judges were not subject to the same disqualifications as jurors, and there are at the present time many grounds of challenge to a juror which are not applicable to judges. At common law the only ground upon which a judge could be excluded from acting was interest in the cause. This disability was founded upon the maxim that no man can be judge in his own cause. Consanguinity to either of the parties, though good cause of challenge to a juror, did not disqualify a judge, for favor would not be presumed in a judge. *Brooke and Earl of Rivers*, Hardres, 503 ; Bouv. Law Dict., title Incompetency. Although judges have voluntarily withdrawn from the bench by reason of consanguinity to parties, 3 Cow. 724, and the judgments of inferior magistrates have been closely scrutinized where the relationship was near, it was not held in this State, before the statute, that such relationship rendered those judgments void. *Eggleston v. Smiley*, 17 Johns. 133 ; *Pierce v. Sheldon*, 13 id. 191.

The absolute disability within the prescribed degrees depends wholly upon the statute, and consequently cannot be extended beyond its terms. 12 Conn. 88.

No doubt many cases may be supposed in which the interest of a relative of the judge in a controversy, to which he is not a party, would fall within the mischiefs intended to be guarded against by the statute. But it has been found necessary for obvious reasons to place limits upon the absolute disqualifications imposed upon judges. The question which we now have to determine is not what circumstances would render it improper or indecorous for a judge to sit, but in what cases is he legally disqualified, so as to invalidate his judicial acts. All others must necessarily be left to the sense of propriety of the judge himself, and as a general rule that is a quite sufficient protection. In the present case there was nothing to indicate the slightest impropriety in the judge's sitting. In so far as his action affected the interests of the stockholders, it was adverse to them, and it did not appear until after he had acted that he was related to any of them. The objection to his sitting, even if they had been actually parties, would have been of the most technical character, supported only by positive law, and not by any considerations of propriety or justice.

Having come to the conclusion that Judge DWIGHT was not disqualified from making the order in question, it is unnecessary to

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consider what the consequences would have been had we arrived at a different result.

The order of the General Term should be reversed, and that of the Special Term affirmed, with costs.

Ordered accordingly.

All concur, except DANFORTH, J., who was of counsel and took no part.

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(77 N. Y. 114.)

Criminal law — larceny — false pretenses.

Defendant, by false representations and with a design to cheat the complainant out of goods, induced him to ship goods to him, with the *indicia* of ownership, on the agreement that the defendant was to advance the freight, sell the goods, and account for the proceeds less the freight. The defendant sold the goods and converted the proceeds. *Held*, not larceny, but false pretenses.

CONVICTION of larceny. The opinion states the case.

Ira Shafer, for plaintiff in error.

Benjamin K. Phelps, for defendant in error. Upon the facts proved the prisoner was guilty of larceny. *Hilderband v. People*, 1 Hun, 19; *Weyman v. People*, 4 id. 511; *Loomis v. People*, 67 N. Y. 322; *Smith v. People*, 53 id. 111; s. c., 13 Am. Rep. 474; *Ross v. People*, 5 Hill, 294; *Mowrey v. Walsh*, 8 Cow. 238; *People v. McDonald*, 43 N. Y. 61.

DANFORTH, J. The plaintiff in error was indicted for the larceny of 501 sacks of malt, the property of John Schelly; he was tried and convicted at a court of General Sessions, in and for the city of New York. No evidence was introduced in his behalf, and at the close of the case on the part of the People, his counsel asked the court to direct an acquittal upon the ground, among others, that upon the evidence the prisoner was not guilty of the offense charged.

The court refused to do so, and the prisoner's counsel excepted. The court then submitted the case to the jury, saying: "If you believe that the prisoner previous to the shipment of the malt formed the design to obtain from Schelly the property in question and to defraud him of the same, and in furtherance of that design knowingly and falsely represented to Schelly that there was a demand in New York city for malt at \$1.60 and \$1.65 per bushel, and Schelly relying thereon forwarded the property to the prisoner for the purpose, and with the understanding that the prisoner should sell and dispose of it for Schelly's account and benefit for cash or good notes at and for the price of not less than \$1.60, or \$1.65, a bushel, and that the prisoner, in pursuance of his design, received said property, and appropriated and converted it to his own use, with intent to cheat and defraud Schelly thereof, and not to account to him therefor, then he is guilty of larceny, without regard to whether he afterward sold the goods or not."

The prisoner's counsel excepted to this instruction, and asked the court to charge the jury: "that if they find from the evidence that Schelly sent the property to Zink, intending Zink to sell the same, and to convey a title to the purchaser, they must acquit, even though Zink intended not to account for the proceeds, but to convert them to his own use. Also, if they find from the evidence that Schelly gave credit to Zink for the property described in the indictment in consequence of Zink's representations to him they must acquit, even though they should find that the representations were false to his knowledge, and that he made them with a preconceived design not to pay for the malt."

The precise meaning of this request is apparent when read in connection with the motion for an acquittal, one ground of which was "that Schelly gave credit to Zink to the extent of trusting him to sell the malt and account for the proceeds." Also, "if Schelly shipped the goods to Zink, and intended Zink should sell them, because of Zink's false and fraudulent representations, and but for such representations he would not have shipped the goods, they must acquit." Also, "if Schelly was induced to send the malt to Zink with the understanding between them that Zink should sell the same and account to Schelly for the proceeds, they must acquit, even though they should also find that Zink, when he received and sold the malt, did not intend to account for the proceeds, but intended to convert, and did convert the proceeds to his own use."

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Also, "that if Schelly was induced to send the malt to Zink, in consequence of his fraud, and the latter never intended to pay for the same, or to account for the proceeds of the same, yet if Schelly's intention in sending the malt was to have Zink sell and deliver the same to a purchaser, and to account to Schelly for the proceeds, they must acquit."

The court refused to charge as requested, and to each refusal defendant's counsel excepted. The court did charge however that if Schelly sold and delivered the property to Zink, they must acquit, although he was induced to make such sale and delivery by the fraud of Zink, and although Zink never intended to pay for them.

The evidence disclosed the following facts : Schelly was a maltster residing in Hamilton, Ohio, from which place he visited New York city in August, 1874, and then on the recommendation of one Vobel, a man in the employ of Schelly, he sought out Zink, and told him that he had come to New York to sell malt, and wanted his assistance. They went together to several breweries but found no customers. One Ehret, however, said he would perhaps buy some, the then next fall. Nothing further occurred at that time between Zink and Schelly, and the latter went home. In December, 1874, with no communication in the meantime from Zink or Ehret, Schelly sent to Ehret two car loads of malt. Ehret refused to receive them. He informed Schelly by letter that he "had a big supply of malt, and could not take it." On the 28th of December Zink wrote to Schelly, "when you were here to see me, you wanted to sell some barley malt and flour. I now have a good chance to sell some for you. Let me know the price as soon as you can, and your terms."

It should be noticed that up to this time there is no solicitation by Zink, nor request for any consignment, and an inquiry now simply for price and terms. Schelly replied by letter "prices are to-day \$1.65 for Canada malt; \$1.60 for Ohio, delivered in New York;" informed him of the shipment to Ehret, and that he declined taking it, "therefore I request you to go to Ehret in case he refuses to take the malt, then try to sell it somewhere else," at the prices stated in the letter. "Let them give the bill of lading to you at once." He also sends him samples by mail, and prices from the newspapers. On the 8th of January, Zink telegraphed, "malt received. Good. Send me two car loads of Canada malt, one of Ohio malt. I will see you as soon as this order is received."

On the 12th of February, Zink sent statement showing sale of malt at \$1.65 and \$1.60, and inclosed Diehl's note for \$1,983.62, at sixty days, for net proceeds payable to order of Zink, and indorsed by him.

On the 18th Zink telegraphs again, "two car loads of malt received. Send three of same kind as soon as possible. Letter follows." On the 22d of February, he wrote, "I will be up and see you about the 17th of March, and bring the money for the two car loads, also money, or good paper for the three cars that are now coming," and wants three cars more, saying "I have the order for three."

In January Zink went to Hamilton. Schelly told him "he had no right to sell that malt on credit, he ought to sell it to brewers and good men; he, Zink, said the note of Diehl was good as gold, he owns a large property on One Hundred and Thirty-fourth street and Third avenue, keeps a large store there," and made other representations as to Diehl's business ability. He wanted more malt, and Schelly not having sacks enough, Zink telegraphed Diehl for 800; he sent Schelly 1200. "These were filled and sent to Zink; he said he would come next week, and pay the money." Zink did return to Hamilton, but without money, carrying two more notes which he gave Schelly, and Schelly received, Zink saying they would be paid at maturity. These were payable to Zink's order, and by him indorsed, due in two months.

In all thirteen car loads were sent. The last on the 1st of March, 1875.

Schelly says "Zink promised to sell the malt to good men and get cash or notes. I expected him to do so." All the malt was billed to Zink in this form, "Peter Zink, Melrose, N. Y. Bought of John Schelly," etc., describing the goods, except the first two car loads, which in like form were billed to Ehret. Bills of lading were also taken by Schelly from the railroad company for the several car loads "to be delivered to Peter Zink or assigns, he or they paying freight on the same at the customary rates, thirty-three cents per hundred. Schelly says "he expected Zink to sell the malt, and account to him for the price, less the freight."

"Q. Except the freight, you expected Zink after selling the malt to return you that amount?

A. Yes, sir.

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Q. You expected him to sell the malt, and return you the amount less the freight?

A. Yes, sir.

Q. You expected him to sell the goods in order that he should get the money?

A. Yes, sir.

Q. You meant he should do that?

A. Yes, sir.

Schuster, a butcher and drover, not acquainted with the malt business, was introduced to Zink in January, and then at Zink's request, commenced making advances on account of the malt, and sold the first two car loads on commission for Zink, and the rest he bought himself at prices varying from \$1.15 to \$1.30. Schuster employed brokers, and the malt was sold in the open market. It was shown that the price of malt for cash, between January and March was at no time up to \$1.60, "but on credit was most of the time at \$1.60." Sometimes fully up to \$1.56. It is the law of this case as given to the jury, and it is now conceded by the learned counsel for the defendant in error, that if under the circumstances in evidence Schelly had parted with the title to Zink, the latter could not have been guilty of larceny. We think the court should have gone farther, and charged, that if Schelly authorized Zink to sell the property to others, he could not be convicted of that crime. He did invest him with a paper title, and so enabled him to confer a title upon a purchaser, good not only against third persons, but good against Schelly himself. And it was obviously Schelly's intention that Zink should confer such a title, without consultation with him. The purchaser might lawfully buy the property of Zink, believing it to be his property, and that belief induced and warranted by the written evidence of title which Schelly had himself prepared, and in regard to the form of which Zink was in no wise privy. Zink did not ask Schelly to invest him with the title; that was Schelly's own voluntary act. By the bills of sale, Zink is represented as the purchaser. By the bills of lading the property was deliverable to Zink, or his assigns. Schelly parted voluntarily with the actual possession of the property, and by vesting the title in Zink, although for the purpose of a sale, parted with the constructive possession of it. Nay, if Zink had himself sent him the money at the price named less the freight the title of Zink would have been perfect in substance as well as form. The evidence would have warranted the jury in

finding that Schelly intended to part absolutely with the ownership, possession and control of the property, and it cannot be doubted that with that finding the crime of Zink would have been the crime of false pretenses. There is still in this State the crime of larceny, and the crime of obtaining property under false pretenses, with different definitions by statute, and subjecting the offender to different punishments; the one a misdemeanor, the other a felony. All distinction between them has been abolished in some of the States of the Union, but until the legislature interferes, the courts of this State have no right or power to disregard that distinction, however technical it may seem. This distinction as we understand it is this: In larceny, the owner of the thing stolen has no intention to part with his property therein; in false pretenses, the owner does intend to part with his property in the thing, but this intention is the result of fraudulent contrivances. And one test we conceive to be this: Could the offender confer a good title upon another by the sale and delivery of the thing? (I do not mean to apply this test to the case of money), but goods and chattels. If obtained by larceny it is clear he could not. *Bassett v. Spofford*, 45 N. Y. 388; s. c., 6 Am. Rep. 101. If obtained by fraud it is equally clear that he could, for in that case the property passes in the subject-matter. In the former case it does not.

Trespass will not lie for goods obtained by fraud, because fraud does transfer the property. *Benj. on Sales*, 353; *Root v. French*, 13 Wend. 570.

In the case before us, the jury if charged as requested might have found upon the evidence that the prosecutor did intrust Zink not only with the possession of the malt, but the *indicia* of property in it, on the faith of his promise to account to him for the proceeds of the sale, when made. And more than this the very language of the bill of lading, chosen by Schelly, imposed upon Zink when he received the malt, the obligation to pay freight upon it, and without that payment he could not have received the property from the carrier. He fulfilled that obligation, and thus by the voluntary act of Schelly acquired not only the absolute and unconditional possession of the malt, but a special property in it to the extent of freight paid, and the *indicia* of perfect ownership. Under such circumstances there can be no larceny. In *Wilson v. State*, 1 Port. (Ala.) 118, it is laid down as the law "that an indictment for larceny will not lie if it appear that the articles alleged to be stolen

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have been transferred so as to create any right or property, or by any consideration, express or implied, or agreement." That was this case. By the bill of sale and the bill of lading, an apparently perfect title was given to Zink, and even as between him and Schelly, a special property or lien upon the malt to the extent of his advances, and a trust as to the whole was created, or credit given. From the moment the malt was shipped by Schelly in the name of Zink, the bill of lading taken in his name and sent to him by Schelly, Zink became the pledgee and special owner of the malt, and in the possession of it; for the possession of the carrier was his possession, as special owner and holder of the bill of lading. Schelly remained the general owner, but he did not have the possession or the right to the possession, or to dispose of or control the malt. Any possession which he might obtain, or dominion he might exercise over the malt without the assent of Zink, would have been tortious, and he could transfer no title to another. This relation of Zink and Schelly toward the property results from the application of elementary principles, but they were reiterated and enforced by this court in the case of the *Marine Bank v. Fiske*, 71 N. Y. 353.

I regard the principle, upon which that case was put, decisive of the one before us. Schelly had divested himself of even the apparent title or authority to dispose of the malt. He had placed it in Zink, and upon a sufficient consideration, in the payment of freight, made him its special owner. That this relation was induced by fraud does not alter the force of the position. For our inquiry is whether the malt was obtained tortiously, or by the consent of the owner. Whether the taking was larcenous, or whether Schelly parted with the possession and with the property. If the latter, then although the transaction was voidable, it was not void, and until affirmed by Schelly it was effectual to convey the title. "If," says PARKE, B., "a person through the fraudulent representations of another delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretenses." *Powell v. Heyland*, 6 Ex. 70; *Rex v. Adams*, Russ. & Ryan's C. C. 225; *Regina v. Thompson*, Leigh & Case's C. C. 233; *Regina v. Cook*, L. R., 1 C. C. 295.

The contention in behalf of the defendant in error is, and such was the opinion of the court below, that nothing was given to the prisoner but the custody of the property for the accomplishment of

a particular object; that he acquired no title to or right to withhold it from the consignor; that the latter continued to be its owner, and could at any time, while the prisoner retained possession, have recovered it from him, and countermanded his authority over it; and in this is error, for Schelly gave Zink power to confer upon a purchaser a good title to the property, and as we have seen, Zink could hold it even as against Schelly until repaid his advances. The bill of lading passed the legal title to the malt, and the circumstance that Zink was to account to Schelly afterward does not alter the case. In *Lickbarrow v. Mason*, 6 East, 22, it is said, that "a factor who has a legal property in goods can never have that property taken from him till he is paid the uttermost farthing that is due to him." It is said Zink was to pay over the proceeds to Schelly; this is not quite accurate. When the goods were sold he was to repay himself for freight advanced in the first place, then to account to Schelly for the residue. Again, one who has advanced, or is under an agreement to advance on account of property consigned to him, cannot be considered a mere servant, or mere agent, so that his possession shall be the possession of the general owner.

It may be granted that Schelly could, if defrauded, disaffirm all that he had done, if he acted before a *bona fide* purchaser from Zink obtained the property; that he could not do this afterward shows that there was no larceny, for if stolen, Zink could give no title. But until disaffirmed the title and the property passed. There is another test which if applied will enable us to solve the question. Assume that no fraud was practiced, and that the goods reached Zink. After this Schelly changes his mind, and will have the goods sent to another market. He could not have that done until Zink had been repaid his advance for freight. Schelly must then have parted with the property, or an interest in the property, to Zink, else he could take it at his pleasure.

It seems to me that the decision of this court in the case of *Bassett v. Spofford*, 45 N. Y. 388; s. c., 6 Am. Rep. 101, recognizes the difference which we have suggested between false pretense and larceny, and unless overruled by subsequent decisions, controls the case at bar, and if followed, must lead to a reversal of this conviction. ALLEN, J., with the concurrence of all the members of the court, save GROVER, J., not voting, p. 391, adopts from Leach the definition of larceny, "as the felonious taking of the

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property of another without his consent and against his will with intent to convert it to the use of the taker," * * * and says "the fraudulent and wrongful taking being proved, with the felonious intent, the *animo furandi*, the only question remaining in any case, is whether the taking was with the consent of the owner, for if so, although the consent was obtained by gross fraud, there is no larceny. But the consent must be to part with the property, and not the naked possession, for a special purpose;" again, "if the owner intends to part with the property, and delivers the possession, there can be no larceny, although fraudulent means have been used to induce him to part with the goods." Now apply this doctrine to the facts in this case.

1st. It is clear that Schelly did consent to the taking by Zink; he himself devised the mode of doing it. He procured the bills of lading without request from Zink, dictated their terms, prescribed the condition of delivery to him, "he paying freight," removed the malt from his warehouse to the cars, directed the carrier to deliver to Zink, and entered into written contract with the carrier requiring it. He parted with possession.

2d. Thus not only the charge or custody of the malt came to Zink, but the legal possession. His possession was not the possession of Schelly. It was not a naked possession. The malt was in his hands for sale, not as a servant or care-taker, but as one to whom it was intrusted to sell, not to a particular person, but to any one. He had dominion over it; as to all the world, except Schelly, as owner, and as to him as consignee and as one having a lien for freight. He had not the bare custody of the malt to keep, or hand over to a particular person, but was intrusted with the property, and the *indicia* of ownership, and this implies an intention on the part of the owner to do something more than give the custody of the property to him, or to make him a mere conduit for its transmission. It means confidence reposed, and credit given to him, not merely as a custodian, but in reliance upon his judgment and discretion in disposing of the malt. Schelly intended Zink should sell the malt; he never expected it to be returned to him, and it made no difference to whom Zink sold it.

3d. It follows that Schelly also intended to part with the property as well as the possession. This is indicated by the bill of sale, which in terms vests the title in Zink, subject undoubtedly to be avoided by Schelly for fraud at any time before Zink had disposed

of it to a *bona fide* purchaser. The case is the same, so far as this question is concerned, as if Zink had been the purchaser in fact, as he was in form. Schelly parted with the title, and intended to do so; he accompanied the title with the possession, and as it seems to us, intended to part with the property and the possession, and so the case is within the decision above cited.

There can be no larceny where there is no trespass. *People v. Call*, 1 Den. 123. There it is said a servant has the charge, but not the possession of his master's goods, and the servant may commit larceny although he has the custody of the goods "but," say the court "when possession of the property is obtained by one as a bailee or purchaser, although by tricks, or fraud, the case stands on other grounds." And Zink, although not a purchaser, was at least a bailee.

Says Bishop in his work on Criminal Law, vol. 2, § 817: "There can be no trespass where there is a consent to the taking. Suppose the consent is obtained by fraud; where the owner means to part with his property absolutely, and not merely with the temporary possession of it, the result is the same, for by reason of the consent there is still no trespass, therefore no larceny." So it was held where the prisoner was the prosecutor's servant, his duty being in the absence of the clerk to purchase on his master's behalf, any kitchen stuff brought upon the premises for sale. On one occasion he falsely pretended to the clerk he had bought some stuff for a sum named, which sum he demanded, and it was paid out of his master's funds; the court held, that as the money was voluntarily parted with, and was not to be returned, the transaction was not larceny, but false pretense. *Regina v. Barnes*, 2 Den. C. C. 59; s. c., 1 Eng. L. & Eq. 579. In the case before us there was no expectation on the part of Schelly that the malt should be returned. Again, larceny implies a changing of property, and to be effectual must deprive the owner not only of the possession but the property. If therefore the consent of the owner is to a transfer of title, however that transfer is to be brought about, there can be no larceny.

In this case the jury might have found, had the question framed by the prisoner's counsel been submitted to them, that Schelly sent the malt to Zink, intending Zink should sell the same, and convey a title to the purchaser. In view of such a finding, if the rule is as we have above suggested, there would be no larceny. It should be observed that no person was indicated as the one to whom Zink

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should sell, but he had general authority. Schelly was parting with the property, expecting at some future time to receive from Zink the proceeds.

In *Ross v. People*, 5 Hill, 294, a conviction for larceny was reversed, because, says COWEN, J., "the goods were delivered by the owner with the intention to sell them," and this although the pretended purchaser "obtained them by false pretenses, and a design *ab initio* not to pay for them." To the same effect is *Mowrey v. Walsh*, 8 Cow. 238, and the ground on which *People v. McDonald*, was placed by this court in 43 N. Y. 61, sustains the view we have endeavored to present. The court say in that case: "If the prosecutor had intrusted the draft to the prisoner for the purpose of getting the gold, and the latter had obtained it and converted it, it would not have been larceny because the prosecutor would have had no possession but that of the prisoner. * * * * It is quite clear that the prosecutor never intended to intrust either the draft or the gold with the prisoner."

On the other hand in the case before us, it is clear that Schelly did intrust the malt to Zink in the fullest and most unreserved manner. He intended to part with its possession and control, and never expected its return. And indeed, we might add also that it was disposed of in precisely the manner he expected it would be, though with a somewhat different result.

The learned counsel for the defendant in error in support of the conviction relies upon *Hilderbrand v. People*, 1 Hun, 19; *Weyman v. People*, 4 id. 511; *Loomis v. People*, 67 N. Y. 322; s. c., 23 Am-Rep. 123; *Smith v. People*, 53 N. Y. 111.

We think there is a clear distinction between those cases and the present.

In *Smith v. People*, *supra*, the prisoner called upon a wife, and stated that her husband had been arrested, and had sent him to her to get some money for his discharge. She gave him some jewelry to pawn, and directed him to give the ticket and money to the husband. He did neither, and his story was false. He was indicted for larceny, and the conviction sustained, the court, saying: "The owner did not part with the property in the chattels, or transfer the legal possession. The accused had merely the custody, the possession and ownership remaining in the original proprietor.

"The rule is, that when the delivery of goods is made for a cer-

tain, special and particular purpose, the possession is still supposed to reside, not parted with, in the first proprietor."

"A distinction is made between a bare charge for special use of the goods, and a general bailment; and it is not larceny if the owner intends to part with the property and deliver the possession absolutely, although he has been induced to part with the goods by fraudulent means. If by trick or artifice the owner of property is induced to part with the custody or naked possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but right of property also, the offense of the party obtaining them will not be larceny, but that of obtaining goods by false pretenses."

Hilderbrand v. People, 56 N. Y. 396; s. c., 15 Am. Rep. 435, was not considered in the Supreme Court, but on review this court say: "We do not think the prosecutor should be deemed to have parted either with possession of, or property in the bill. It was an incomplete transaction to be consummated in the presence and under the personal control of the prosecutor. There was no trust or confidence reposed in the prisoner, and none intended to be. The delivery of the bill and giving change were to be simultaneous acts, and until the latter was paid the delivery was not complete. The prosecutor laid his bill upon the counter, and impliedly told the prisoner that he could have it upon delivering to him \$49.90. Until this was done, neither possession nor property passed, and in the meantime the bill remained in legal contemplation under the control, and in the possession of the prosecutor." In the *Weyman* case (4 Hun, 511), the question came up. On the memorandum order certain articles were applied for, "for the purpose of showing a customer, and enabling him to select, which, if either, he would take, and if he accepted either, the money, and the other articles, was to be returned."

In *Loomis v. People*, 67 N. Y. 322, the court say: It cannot be denied that the prosecutor intended to part with the possession or the ownership of the money. It was handed over for a particular purpose with no intention to loan it or surrender the title, and it was only in case of its loss that other money was to be procured upon the check. Great importance is attached to the fact that it was passed over for a temporary purpose, and the learned judge who delivered the opinion says the case is on the border line. While

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considering the distinction between larceny and false pretenses, he says: "It will be observed that the intention of the owner to part with his property is the gist and essence of the offense of larceny, and the vital point upon which the crime hinges and is to be determined."

None of these cases determine or indicate any principle upon which the conviction in the case before us can be sustained.

In all of them the property was placed in the hands of the wrongdoer for a specific purpose. In none of them was the legal possession changed, nor was there an intention to part with the title or interest in the property.

In the case before us the prisoner lawfully acquired the absolute possession of the property. A title by the voluntary act of the prosecutor; a special property in it, and right of possession even against the prosecutor, because in accordance with the very terms which he prescribed, Zink paid freight upon its carriage.

In none of the cases referred to, can the property be said to have been intrusted to the prisoner; here it was. The prosecutor reposed confidence in him, trusted the property to him for sale to such person as he might select, intended to part with his title, and never expected to see the malt again. He intended to part with his property before he received the money; the two events were not to be simultaneous. His consent to the transfer of the property was full, and without conditions, and in such a case there can be no larceny, although the consent was obtained by fraud. We think the exception to the charge of the trial judge was well taken, and that he should have charged as requested by the prisoner's counsel. Therefore, the judgment of the Supreme Court and the conviction should be reversed, and a new trial granted.

Judgment reversed.

All concur.

LUDDINGTON V. BELL.

(77 N. Y. 138.)

Accord and satisfaction — note of partner for part of firm debt.

A creditor of a dissolved partnership accepted the note of one of the partners for a portion of his demand, in discharge of the maker from liability for the partnership debt; *held*, an effectual release.

ACTION on a note made by the firm of A. C. & J. W. Bell. Defendant, A. C. Bell, answered, setting up a release and discharge. The plaintiff had judgment below. The opinion states the facts.

E. H. Benn and *H. T. Cleveland*, for appellant.

Nathaniel C. Moak, for respondent. The agreement to release the appellant being by parol and without consideration was void. *Harrison v. Close*, 2 Johns. 447; 3 Am. Dec. 444; *Lane v. Nelson*, 38 N. J., L. R. 358; *Kellogg v. Olmstead*, 25 N. Y. 189; affirming, 28 Barb. 96; *Reynolds v. Ward*, 5 Wend. 502; *Gibson v. Renne*, 19 id. 338; *Hunt v. Bloomer*, 5 Duer, 202; *Turnbull v. Brock*, 31 Ohio St. 649; *Hays v. Davis*, 6 U. C. (Q. B.) 396; *Doty v. Wilson*, 5 Lans. 7; *Ryan v. Ward*, 48 N. Y. 204; s. c., 8 Am. Rep. 539; *Bunge v. Koop*, 48 N. Y. 229; s. c., 8 Am. Rep. 546; *Williams v. Irving*, 47 How. 440, 442; *Brooks v. Moore*, 67 Barb. 394, 395; *Bliss v. Shurts*, 65 N. Y. 444; *Carrington v. Crocker*, 4 Abb. Pr. (N. S.) 335; *Keeler v. Salisbury*, 33 N. Y. 653; *Fitch v. Sutton*, 5 East, 320; *Harrison v. Close*, 2 Johns. 448; 3 Am. Dec. 444; *Dederick v. Leman*, 9 id. 333; *Mechanics' Bank v. Hazzard*, 13 id. 353; *Seymour v. Minturn*, 17 id. 169; 8 Am. Dec. 380; *Platts v. Walrath*, Lalor's Supp. 59; *Tyles v. Yates*, 3 Barb. 322; *Frink v. Green*, 5 id. 455; *Bronson v. Fitzhugh*, 1 Hill, 185; *Bouchand v. Dias*, 3 Den. 238, 241; *Hasson v. Rease*, 44 Barb. 347; *Cooke v. Jeunor*, Hob. 66; *Rees v. Berrington*, 2 Ves. Jr. 544; *Bank v. Ibbottson*, 5 Hill, 461; *Gunther v. Lee*, 45 Md. 60; s. c., 24 Am. Rep. 504; *Ruble v. Turner*, 2 Hen. & Munf. (Va.) 38; *Kent v. Reynolds*, 8 Hun, 559; *Beach v. Endress*, 51 Barb. 570; *Gray v. Barton*, 55 N. Y. 68; s. c., 14 Am. Rep. 181.

MILLER, J. The determination of this case depends upon the question whether the money paid and the notes given and paid, under the agreement with the plaintiff, was a valuable consideration for the discharge of the defendant from liability upon the note of the co-partnership. The evidence shows that after the co-partnership existing between the defendants had been dissolved, it was agreed between the plaintiff and the defendant, Amos C. Bell, that if the latter should pay one-half of the note in suit, upon such part payment being made by him it should be in full as against him, and that he should be released and discharged from

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further liability for the same. The plaintiff received in part payment a check and four promissory notes payable in one, two, three and four months after date, which notes were paid when due by the defendant. Until this time had elapsed, the defendant, Amos C. Bell, had no right of action or remedy for contribution against Jared W. Bell. He could not sue until the notes were paid, for the time of payment had been extended to the amount of the notes, and had he paid up the notes given by him and sued his co-defendant for contribution before the notes became due, it is at least questionable whether a defense might not have been interposed that the time had been extended, and that a portion of the demand was not due. In this view, there might, perhaps, have been a sufficient consideration for the contract made, by giving the new notes.

But even if we are wrong in this respect, we think that there was an ample consideration, by the giving of the individual note of A. C. Bell, one of the partners, for the debt of the co-partnership, in consideration of a release from further liability and a discharge of the defendant from the partnership debt.

An individual obligation may be a higher security than that of a co-partnership, and a debt due from partners may not always be as substantial and safe as a debt against one of them; for such co-partnership debt must be first collected out of the co-partnership assets, and not out of the individual property of the several partners, until these are exhausted; and then only after the individual debts are fully paid. Take the case of an individual who has assets out of which a debt may be collected. It is easy to see that the chance of collection would be far better against one of a firm than against a co-partnership which had met with losses and was not in a condition to meet its pecuniary obligations.

In *Waydell v. Luer*, 3 Den. 410, it was held that the giving of a promissory note for a co-partnership debt by one of several partners after the dissolution of a co-partnership, under an agreement by the creditor to accept it in payment of the debt, extinguishes the liability of the other co-partners. This case is directly in point. Lott, senator, argues with great force that an individual note of one partner may be preferable and a better security than a demand against the firm, and proceeds to say: "It is evident, therefore, that it may frequently occur that a claim against a firm may in fact be worth less than if held against one of its members, not merely on account of the means of enforcing payment, but as to

the availability of the fund out of which it is to be made ; and although the learned judge, in delivering his opinion below, says, he 'is unable to see how the name of one is better alone than when joined with another's in point of solvency ;' yet it is clear from the principles above referred to, that it may be more available as a security. When therefore a creditor agrees to release a joint indebtedness by the acceptance of a note or any other obligation of one of his debtors in payment, he receives a consideration which may be more valuable to himself than the original claim. Whether it is in fact so, is wholly immaterial. The slightest consideration is sufficient to support the most onerous obligation. *Oakley v. Boorman*, 21 Wend. 588. Indeed, the additional obligation assumed by one of its debtors, by becoming responsible severally for the entire debt, would of itself render it a valid agreement. It is not necessary that there should be a benefit. Damage or loss by one party, sustained at the request of the other, is sufficient. As it is expressed by Chancellor KENT, 'a valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.' 2 Kent Com. 465, 2d ed." See, also, *Beach v. Endress*, 51 Barb. 570 ; *Kent v. Reynolds*, 8 Hun, 559. The case of *Waydell v. Luer*, was approved in the Supreme Court in the case *La Farge v. Herter*, 11 Barb. 171 ; and ALLEN, J., who wrote the opinion, after citing and commenting upon *Waydell v. Luer*, says : "We adopt the conclusions of Senator Lott as the law of the land, for the reason that we suppose they were adopted and settled by the court of last resort in the State, and also because we think them abundantly fortified by authority and by the reasoning of the learned senator."

This case is directly in point, and unless overruled by other adjudications, should be decisive of the question discussed. An examination of the leading cases relied upon by the respondent's counsel will show, we think, that they are not in conflict with the case now considered. In *Harrison v. Close*, 2 Johns. 447 ; 3 Am. Dec. 444, a sum of money was paid upon a promissory note by one of two joint makers, and a verbal agreement made at the time that the owner of the note would not call upon the person paying for payment, but look to the other joint maker for the residue ; and it was held that the agreement and acceptance of the money was no satisfaction of the note. It will be seen that the time of payment was not extended for any part of the note, and no new obligation assumed by one partner

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upon which a consideration could be based. In this respect there is a manifest distinction from the case at bar. In *Bliss v. Shwartz*, 65 N. Y. 444, the defendant had compromised with his creditors, a number of whom had signed a composition agreement to take a certain sum in full of their several claims. The plaintiff had agreed to settle on the same terms, with some addition. The notes were surrendered, a draft given for the money to be paid, and the plaintiff's receipt in full delivered. The note given under the arrangement was also paid when due, and the plaintiff did not sign the composition agreement. Upon an action brought to recover the balance of the indebtedness, the defendant was held liable. The decision was put upon the ground that the evidence failed to show that the plaintiff intended to unite with the other creditors in the general scheme of compromise; and that there was no new consideration sufficient to sustain the agreement or to constitute an accord and satisfaction. It was also held that if the agreement had been to accept the draft in lieu of the plaintiff's claim, there would have been a sufficient consideration to sustain the compromise. Here also was a want of consideration; and if, as held, the taking of the draft would have been a sufficient consideration, then certainly the acceptance of money, and the notes given in lieu of the plaintiff's claim against defendant and his partner, would constitute an ample consideration. It may be observed also that here the intention of the parties was abundantly established by the testimony, while in the case last cited there was a failure to show such intention. The case of *Line v. Nelson*, 38 N. J. 358, was very much like *Harrison v. Close*, *supra*, and appears to have been decided upon the authority of that decision. It therefore has no application.

The doctrine that payment by the debtor of a less sum than the whole amount of the debt will not extinguish the debt, although the creditor expressly agree to receive it in full and give a receipt or writing to that effect, is well established by abundant authority. But while the correctness of the rule stated may be conceded, it should be borne in mind that it rests mainly upon a want of consideration for the promise made. The cases cited to sustain this proposition, therefore, have no bearing upon a case where a consideration is shown, as will be seen by a reference to the same. *Ryan v. Ward*, 48 N. Y. 204; s. c., 8 Am. Rep. 539; *Bunge v. Koop*, 48 N. Y. 229; s. c., 8 Am. Rep. 546; *Brooks v. Moore*, 67 Barb. 394, 395; *Keeler*

v. *Salisbury*, 33 N. Y. 653. The want of consideration for the new agreement is the leading element which prevents a defense in cases of this description. *Carrington v. Crocker*, 37 N. Y. 338.

Nor is it any answer to say that the debtor paid nothing which he was not already bound to pay, if there is a valid consideration, for that consideration, however small it may be, will operate to discharge the obligation. It is of no importance, where a consideration exists, that the effect of the transaction is to release and discharge one joint debtor, without a consent by the other, and thus discharge both. Such a contract may be made, if there is a consideration for it; and the party who consents to such discharge can have no real ground of complaint that the bargain which he has made produces such an effect, as it is to be presumed that he entered into the contract with full knowledge of the legal consequences of his so doing.

The claim made that there was no consideration for the alleged agreement to collect the remainder, is fully answered, as already shown, by the fact that the notes given added to the security of the defendant's debt. Something was parted with, and something received, beyond the security which the plaintiff had; and however slight this may have been, it was an advantage and benefit conferred, upon which a sufficient consideration might be founded. In view of the fact that a new consideration existed for the contract, the rule that a release of one or two or more joint debtors must be under seal, has no application.

Nor is it necessary to consider whether the transaction constituted a valid compromise or discharge, under the act of 1838, which provides for compromises by partners and joint debtors. The agreement was valid and legal, independent of that act; and being supported by a sufficient consideration, it should be upheld. It follows that the court erred upon the trial in directing a verdict for the plaintiff; and the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLGER and RAPALLO, JJ., absent at argument, and EARL, J., not voting.

Judgment reversed.

 Hay v. Star Fire Insurance Company.

HAY V. STAR FIRE INSURANCE COMPANY.

(77 N. Y. 235.)

Insurance — action to reform policy — limitation for bringing.

In an action to reform a policy of insurance, after loss, *held*, (1) an agreement to renew a policy of insurance is presumed to imply that no change is to be made in its terms. (2) Such action is not "for the recovery of any claim by virtue of this policy," within the meaning of a provision that "no action for the recovery of any claim by virtue of this policy shall be sustainable" unless commenced within twelve months after the loss. (3) The limitation commences when the amount of the loss is due and payable, and not when the loss occurred.*

ACTION to reform a policy of insurance. The opinion states the facts. The plaintiff had judgment below.

Osborn E. Bright, for appellant. The only contract between the parties was for a policy that should cover plaintiff's loss after exhausting the mortgage. *Aetna Ins. Co. v. Tyler*, 16 Wend. 385, 397; *Kernochan v. Bowery Ins. Co.*, 17 N. Y. 428. The application for a renewal of the policy and the entry in the book of the company did not constitute a contract. *MacKenzie v. Coulson*, L. R., 8 Eq. 368; *Kent v. Manchester*, 29 Barb. 595; *Bap. Ch. v. Brooklyn Fire Ins. Co.*, 28 N. Y. 161; *Hughes v. Mer. Ins. Co.*, 55 id. 265; s. c., 14 Am. Rep. 254. A policy of insurance cannot be reformed unless the proof is unquestionable and free from reasonable doubt. 1 Story's Eq. Jur., § 157; *Collett v. Morrison*, 12 Eng. L. & Eq. 171; *Phœ. F. Ins. Co. v. Gurnee*, 1 Paige, 278; 19 Am. Dec. 431; *Del. Ins. Co. v. Hogan*, 2 Wash. Cir. 4; *Lyman v. U. Ins. Co.*, 2 Johns. Ch. 630; *Andrews v. Essex F. and M. Ins. Co.*, 3 Mas. 10. The basis of the action is mistake and to obtain relief the mistake must be mutual. *Bryce v. Lor. F. Ins. Co.*, 55 N. Y. 240; s. c., 14 Am. Rep. 249; *Jackson v. Andrews*, 59 N. Y. 244. Plaintiff's receipt of the policy in June, 1868 and her renewal of it from year to year until October, 1873, constituted an acceptance by which she was bound, notwithstanding her omission to read it. *Breese v. U. S. Tel. Co.*, 48 N. Y. 132, 139; s. c., 8 Am. Rep. 526; *Hopkins v. Westcott*, 6 Blatch. 64; *Long v. N. Y. C. R. R. Co.*, 50 N. Y. 76; *Fibel v. Livingston*, 64 Barb. 179; *Steers v.*

*See *Johnson v. Humboldt Ins. Co.*, ante, p. 47.

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Liv., N. Y. and P. SS. Co., 57 N. Y. 1 ; s. c., 15 Am. Rep. 453 ; *Pindar v. Res. F. Ins. Co.*, 47 N. Y. 114 ; *Kirkland v. Dinsmore*, 62 id. 171 ; *Phillips v. Gallant*, id. 256, 263, 264.

Charles A. Davison, for respondent.

CHURCH, C. J. This is an action to reform a policy of insurance, by striking out the following clause : " 13. In all cases of loss, the assured shall assign to this company all his right to receive satisfaction therefor, from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same, at the expense of this company. When insured as a mortgagee, the loss shall not be payable until payment of such portion of the debt shall have been enforced as can be collected out of the original security, to which this policy may be held as collateral, and this company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security," and to recover upon the policy as reformed.

The plaintiff had a previous insurance of her interest as mortgagee, to the extent of \$2,500, the amount of her mortgage upon the mortgaged premises, situate in Westchester county. That policy did not contain the clause in question. A few months afterward, the plaintiff loaned to the mortgagors \$500, in addition, and took another mortgage to secure the payment thereof, and applied to the defendant for a renewal of the first policy at \$3,000, which was agreed to, and a new policy issued with the foregoing clause inserted; and the same was renewed several times by renewal receipts, until the fire took place. Neither the plaintiff nor her agent discovered the change in the policy until after the fire. Both mortgages contained the usual insurance clause, and it was agreed that the mortgagors should pay the premiums, and have the benefit of the policy, in reduction of the debt. These facts are distinctly found by the trial judge, and we think that they justify the conclusion of law that the plaintiff is entitled to judgment, and we concur with the opinions at General and Special Term.

It is insisted in behalf of the defendant, that the evidence did not justify the finding that there was any agreement to issue a new policy like the old one, except in amount.

An agreement to renew a policy implies that the terms of the existing policy are to be continued, and this would be so of any

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instrument, in the absence of evidence, that a change was intended. The plaintiff's husband and agent, testified, "I made application to the Star Fire Insurance Company to have another policy made for \$3,000, renewal of the old policy, and increase it to \$3,000. The company made a minute of the application, and said they would consider it, insure it for \$3,000, in place of \$2,500." The president of the defendant corroborates this evidence. He states that Mr. Hay applied for a renewal of the policy, saying that he had loaned \$500, and wanted the policy made for \$3,000, instead of \$2,500, and that the following entry was made in two handwritings: "Mrs. I. Hay, Mount Vernon, N. Y., renewed. 1019 June 1, a a \$3,000." From this evidence the court was justified in finding an agreement to renew the policy. True, Mr. Hay says that the company said that it would consider the application, but the entry made by different officers indicates that it was accepted, and that the policy was to be "renewed." But if the application was not accepted at that time, the subsequent delivery of a policy as a renewal in ostensible compliance with the application, could have the effect in the absence of notice or explanation that the terms of the policy had been altered. The two policies were materially unlike.

The first contained no provision for subrogation, and as the mortgagors paid the premium, and especially with the agreement that the insurance was to be taken for their benefit, the amount received on the policy would apply to reduce the mortgage debt. *Kernochan v. Bowery Fire Ins. Co.*, 17 N. Y. 428; *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 id. 343; s. c., 14 Am. Rep. 271. The clause inserted in the last policy makes the defendant a mere guarantor of the collection of the mortgage, and an insurer of the debt, a contract practically of no benefit either to the insured or the mortgagors. It was an insurance which the plaintiff under the arrangement with the mortgagors had no right to accept, and one which in *Excelsior Co. v. Royal Ins. Co.*, *supra*, it is more than intimated the defendant had no right to make. It was bad faith on the part of the defendant to change so radically the terms of the policy, and deliver it as a policy simply renewing the old one, without notice of the change. A party, whose duty it is to prepare a written contract in pursuance of a previous agreement to prepare one materially changing the terms of such previous agreement and deliver it as in accordance therewith, commits a fraud which entitles the

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other party to relief according to the circumstances presented. Equity will reform a written instrument in case of mutual mistake, and also in cases of fraud, and also where there is a mistake on one side, and fraud on the other. *Welles v. Yates*, 44 N. Y. 525; *Rider v. Rowell*, 28 id. 310, and cases cited. The negligence of the plaintiff in not discovering the change, and laches in not sooner seeking relief, are questions which make the propriety of granting relief in a given case discretionary. The court below upon the findings of fact we think properly exercised its discretion in this case in granting relief. Policies of fire insurance are rarely examined by the insured. The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments. It is found that the plaintiff did not in fact examine the policy until after the fire, when, for the first time, he was informed of the peculiar terms of this provision.

An effort was made on the part of the defendant to show that the original agreement before the first policy was made was for such an insurance as was made by the last policy, or at least that such an insurance might have been made under that agreement. There was a refusal to find this, and the evidence on that subject is ambiguous, and it is very doubtful, to say the least, whether that evidence would have justified such a provision as this. The defendant certainly made no mistake in inserting the provision contained in the first policy, and even if it might have inserted a different one, it is bound by the contract which it actually made. Considering the arrangement between the plaintiff and the mortgagors, and the terms of the first policy, it must be assumed that the contract made was in accordance with the intention of both parties, and it is not material whether the plaintiff actually read the first policy or not. He was entitled to the benefit of it, and when the defendant agreed to deliver a policy renewing it, and delivered it as such, it had no right to change its terms without the consent of the plaintiff.

The policy contained this provision: "12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against

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the company after the expiration of the aforesaid twelve months; the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

It is objected that the limitation of twelve months after the loss occurred had expired, before the action was commenced, and that the action is barred. There are several answers to this objection. 1st. It is at least doubtful whether in strictness the limitation applies, except in case an award is made fixing the amount of the claim. 2d. The clause sought to be struck out is entirely inconsistent with the limitation of twelve months after the loss occurred, as a compliance with that clause would ordinarily occupy the whole or the greater part of that period, and hence it cannot be supposed that the parties intended the limitation to apply to such a case. 3d. The action is not for a "claim by virtue of this policy," but to compel the defendant to give a policy according to the agreement of the parties. This point is the same as though no policy had been given, and the action was for a specific performance of the agreement to insure. The limitation does not apply. The defendant cannot take advantage of a condition, the performance of which, it has prevented. *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253-264. The limitation clause was not contained in the first policy. 4th. I am of opinion that the limitation should be construed to commence when the loss was due and payable, and not from the time of the physical burning of the property.

A contract of insurance is to be construed with reference to all its provisions, and in accordance with the rules which prevail for the construction of statutes and other contracts. A material condition of this policy is that proofs of loss are to be furnished as soon as possible after the fire, which means within a reasonable time. Such time is necessarily indefinite, depending upon a variety of circumstances, and after being furnished may be objected to as defective, and amended proofs required. This may occupy several weeks, or several months. In this case the fire occurred in October, and proofs of loss were not perfected until April after, and no question of laches was made. The delay may have been mutual or unavoidable. The policy provides that the loss shall be paid "sixty days after due notice and satisfactory proofs of the same shall have been made by the assured." So that eight months of the twelve claimed as the period of limitation had

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expired without fault on the part of the plaintiff before the right to bring an action accrued, and it might often happen, that the whole period would elapse before such right accrued. It seems to me absurd to suppose that the parties intended to fix a limitation of time for bringing an action, so that by a compliance with other conditions of the policy the whole time might elapse, and thus result in depriving the party of the right to bring any action. The error of the position is in supposing that courts are bound to apply the words "after the loss shall occur," to the time the property was actually destroyed. It is far more reasonable to refer it to the time when the loss has become a fixed demand against the company, and the assured has a right to bring an action for it. The loss should be deemed to occur when the company pays it, or is lawfully called upon to pay it. The loss then, and not until then, practically occurs to it. These words may in some clauses refer to the destruction of the property, but it does not necessarily follow that they do in this. One of the most familiar rules is, that written instruments should be construed with reference to the subject-matter. The subject-matter was the limitation of time for bringing an action, and the provisions of law on that subject may be presumed to have been in the minds of the parties. Among the various statutes of limitation, fixing a specified period within which any class of actions must be brought, not one permits the time to commence running until the right to bring the action exists, and the time does not commence running in some until the parties have knowledge of the facts entitling them to bring the action, and it is never permitted to run against a party who is under a disability to bring the action.

The parties intended to shorten the time for commencing an action, but an intent to violate the universal rule, applicable to this subject, founded alike in principle and practice before referred to, ought not to be imputed. Such a construction would in all cases restrict the time fixed for an indefinite period, and in some cases deprive a party of a right to bring an action at all, which is absurd, and an absurd result should never be reached by construction. By construing these words with reference to other clauses, there is no difficulty in reaching a reasonable result.

It is a maxim of the law that "he who considers merely the letter of an instrument goes but skin-deep into its meaning." Broom's Maxims, 657. There is no authority for giving a cold

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literal meaning to isolated words, disconnected from the subject-matter, and from other provisions of the instrument.

The reasoning in the case of *Ames v. New York Union Insurance Company, supra*, sustains the construction here indicated, and in *Mayor v. Hamilton Fire Insurance Company*, 39 N. Y. 46, the point was substantially decided. The condition there was "unless such suit or claim shall be commenced within the term of six months after any loss or damage shall accrue." The court say, that "the words 'loss or damage' are not used with legal precision. Within six months after the right of action shall have accrued, was no doubt what the parties intended," and it was held that the six months commenced to run from the time the right to bring an action existed. We regard that case as decisive upon this point. The court very properly characterize the condition thus: "It is in derogation of the rights of the assured, as given by the statute of limitations of the State. It is often not known, or not considered by the assured, and should only be permitted to prevent a recovery, when its just and honest application would produce that result."

In this case the loss became payable June 6th, and the action was commenced in January after, or within seven months.

Upon the other points, we concur with the court below.

The judgment should be affirmed.

Judgment affirmed.

All concur except EARL, J., dissenting.

KILMER V. SMITH.

(77 N. Y. 226.)

Deed — action to reform — fraudulent insertion.

Defendant A contracted to convey to defendant B certain premises subject to certain mortgages. B assigned the contract to plaintiff. Without the consent or knowledge of B or the plaintiff, A inserted in the deed a clause binding plaintiff to assume the payment of the mortgages. The plaintiff, supposing the deed conformed to the agreement, accepted it and put it on record. *Held*, that plaintiff could maintain an action to reform the deed by striking out that clause.

ACTION to reform a deed. The opinion states the case. The plaintiff had judgment below.

Henry E. Davies & Everett P. Wheeler, for appellants. Where a deed differs from a prior written contract there is no presumption that the whole agreement was expressed in the contract, and the deed will not be reformed unless it is shown clearly that both parties understood the actual agreement to differ from that expressed in the deed. *Gillespie v. Moon*, 2 Johns. Ch. 596; 7 Am. Dec. 559; *Denham v. Cornell*, 67 N. Y. 563; *Stone v. Browning*, 68 id. 598; *Jackson v. Andrews*, 59 id. 244, 247; *Souverbys v. Arden*, 1 Johns. Ch. 250; *Nevius v. Dunlap*, 33 N. Y. 676; Story's Eq., §§ 152, 157; *Baker v. Lever*, 67 N. Y. 304; s. c., 23 Am. Rep. 117; *Massou v. Bovet*, 1 Den. 69; *Marquis of Townsend v. Stangroom*, 6 Ves. 328, 341; *Hinckley v. Smith*, 51 N. Y. 21; *Preston v. Morton*, 66 id. 452; *Reynolds v. Douglass*, 12 Pit. 497, 506; *Mead v. West. Ins. Co.*, 64 N. Y. 453; *Story v. Conger*, 36 id. 673; *Lyman v. United Ins. Co.*, 17 Johns. 373; *Cook v. Eaton*, 16 Barb. 439; *Taylor v. Baldwin*, 10 id. 585; *Kent v. Manchester*, 29 id. 595; *Pennel v. Wilson*, 2 Robt. 509; *Moran v. McLarty*, 11 Hun, 66; *Maghan v. Hartford Life Ins. Co.*, 12 id. 322; *Wilson v. Randall*, 67 N. Y. 338, 342; *Beaumont v. Bramley*, 1 Tur. & Rus. 41; *Tain v. Old*, 1 B. & C. 634; *West v. Earnsey*, 1 P. Wms. 349; 1 Story's Eq., § 160. Equity would not have enforced specific performance of the written contract. *Joynes v. Statham*, 3 Atkyns, 389; Fry on Spec. Perf., §§ 475, 486; *Coles v. Bowne*, 10 Pai. 526; 1 Story's Eq., § 134; *Martin v. Pycroft*, 2 De G., McN. & G. 785; *King v. Hamilton*, 4 Pet. 311; 2 Kent, 482 (12th ed). Where no written instructions were given as to the preparation of the writings, parol evidence will be received as to the intention of the parties. 1 Story's Eq., § 164, *f. e.*; *Price v. Sey*, 4 Giff. 235; *Post v. Leet*, 8 Pai. 337; Fry on Spec. Perf., §§ 1, 79. Plaintiff's failure to read the deed was no excuse. *Breese v. U. S. Tel. Co.*, 48 N. Y. 139; s. c., 8 Am. Rep. 526; *Kirkland v. Dinsmore*, 62 N. Y. 171; s. c., 20 Am. Rep. 475; *Phillip v. Gallant*, 62 N. Y. 256.

Walter S. Cowles, for respondent.

DANFORTH, J. This is an appeal from a judgment of the General Term of the Superior Court of the city of New York, affirming a

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judgment of the Special Term, after a trial before the court without a jury.

The plaintiff was the grantee in a deed of land on Seventy-seventh street, executed by the defendant, Smith and wife, reciting a consideration of \$105,000, in hand paid, dated April 30, 1874, acknowledged on the first day of May thereafter, and immediately recorded. The plaintiff did not sign the deed, but after the usual premises, including a description of the property granted, and the habendum clause, were words declaring that the grant was subject to three mortgages which are therein particularly described, amounting in the aggregate to \$75,000, and then followed these words: "which said three several mortgages, together with the interest thereon the party of the second part expressly assumes and agrees to pay off and discharge, the same forming a part of, and having been deducted by the said party of the second part from the consideration of purchase-money hereinbefore expressed."

This action was brought against the appellants and John A. Dake, and the mortgagees named in the three mortgages, for the purpose of having the clause above cited, stricken from the deed. The relief sought was granted. The trial court found that on the 14th day of April, 1874, the defendants, James H. Smith, and John A. Dake, entered into an agreement in writing, by which Dake, as party of the first part, agreed to sell to Smith, certain premises known as No. 11 East Fifty-seventh street, in consideration of one dollar in hand paid, and the sum of \$90,000 to be paid as follows, viz.: \$30,000 by an existing mortgage for that amount, then a lien against the premises; \$30,000, by a deed of four lots of land in Seventy-seventh street, the premises in question, then owned by the party of the second part (Smith), subject to existing bonds and mortgages of \$75,000; \$30,000, at times specified, viz.: "\$10,000, in cash May 1, 1874, \$5,000 in four months from May 13, 1874, \$15,000 in one year from May 13, 1874, secured by bonds and mortgages executed by Smith at the time of the passage of title, on or before May 1, 1874." It then provides that the party of the first part (Dake), on receiving such payment, shall convey the Fifty-seventh street property to Smith.

The trial judge also found that before the 1st of May, 1874, Dake for a good consideration, with the assent of Smith, assigned his interest in that part of the contract which provided for the conveyance of the Seventy-seventh street property, to the plaintiff Kilmer,

and directed the deed thereof to be made to him, and Kilmer thereupon discharged a mortgage which he then held on Dake's property in Fifty-seventh street referred to in the contract. He also finds that neither Dake nor Kilmer ever at any time agreed to assume or pay the three mortgages above specified, or either of them, or any part of either of them, and that the clause above quoted from the deed was inserted therein by the defendant Smith, without the knowledge or consent of Dake or the plaintiff, and that "the plaintiff took the deed, and caused it to be recorded in ignorance of the fact, that the said clause, or any clause or words of like import or effect, was contained therein, and supposing and understanding that the said deed in that particular (as in all other respects) corresponded to the express terms of the said written contract, and the insertion of said words and clause above recited in said deed was unauthorized by the terms of the contract, and was a fraud upon the plaintiff," and as a conclusion of law, that the plaintiff was entitled to judgment as demanded in the complaint, that the deed be reformed and corrected by striking out the clause referred to.

Exceptions were taken to the findings of fact, but those findings were satisfactory to the General Term; and our examination of the case, aided as we have been by a most able and elaborate argument by counsel of the respective parties, discloses none which has not evidence to sustain it. If therefore there has been error in weighing or considering it, it is not one which we can correct.

The deed was to be drawn in pursuance of the contract, and to carry out the bargain therein expressed. It is plain that the deed goes much beyond the contract, and imposes upon the plaintiff an obligation not suggested or warranted by the terms of the agreement. It is also apparent from the contract that at the time of its execution both parties understood the difference between a conveyance subject to a mortgage, and one with an agreement to assume and pay the mortgage. To warrant the imposition of such an obligation upon the plaintiff required a new agreement or at least an assent on his part.

In this case there is not only no finding of such agreement or assent, but on the contrary, there is a finding that there was no agreement or assent by the plaintiff or his assignor, and further that the deed was taken by the plaintiff in ignorance, and upon the supposition that it was drawn in accordance with the contract. There is evidence which sustains this finding. The case is not to

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be regarded as one of mutual misunderstanding or mistake, but rather as a case where one party deliberately inserted in a deed a covenant tending to his own advantage and another's prejudice, and the latter in ignorance that the instrument contains the covenant accepts it as in fulfillment of a contract which requires no such stipulation. The denial of relief in such a case would be at variance with long-established doctrines of courts of equity, and a reproach to the law itself. 1 Story Eq. Jur., § 138c. It has therefore been held that the ignorant party is entitled to relief, notwithstanding the other acted advisedly and upon full information, for that being admitted, there is fraud. *Welles v. Yates*, 44 N. Y. 525 ; *Botsford v. McLean*, 45 Barb. 478 ; affirmed by Court of Appeals May, 1870 ; *Rider v. Powell*, 28 N. Y. 310. The facts found by the trial court bring the parties within the principle established by the cases above cited. Nor do those referred to by the learned counsel for the appellants establish any different doctrine. The one most relied upon is *Jackson v. Andrews*, 59 N. Y. 244. In that the very element upon which the decision in the case before us rests was wanting. GROVER, J., says: "To entitle the plaintiff to a reformation of the contract, he must prove that it was the intention of both parties to make a contract such as he sought to have established, and that this intention was frustrated, either from some fraud, accident, or mutual mistake of the parties."

In the case at bar the intention of both parties was to have the deed conform to the written contract ; that it did not so conform was owing to the fraud of one party, and the ignorance or misapprehension of the other. Other and numerous authorities are cited for the appellants, in support of the doctrine that a court will be justified in modifying a written instrument upon the ground of mistake only when it is mutual, but for reasons above stated, those cases do not apply to the one before us.

These views dispose of the principal question in the case, and as we find no error in the rulings of the court upon the trial, or in the refusal of the trial judge to make additional findings, require that the judgment appealed from be affirmed.

Judgment affirmed.

All concur.

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FIRST NATIONAL BANK OF MEADVILLE V. FOURTH NATIONAL
BANK OF THE CITY OF NEW YORK.

(77 N. Y. 320.)

Negotiable instrument — negligence of agent in presentation — damages.

On the 22d of March, 1866, the National Bank of Crawford County, Pennsylvania, made and delivered to plaintiff a sight draft upon Culver, Penn & Co., of New York city. The plaintiff indorsed it and sent it by mail to defendant, its corresponding bank in that city, for collection and credit. Defendant received it on the morning of March 26, presented it on the same day, received the drawee's check upon the Third National Bank of New York, and delivered up the draft. The check was not presented for payment until the next day, and then through the clearing-house. The drawees failed on the latter day, and the bank refused to pay the check. The defendant on the same day returned it and received back the draft, formally demanded payment of the draft, protested it for non-payment, and the next day mailed notice thereof to plaintiff and the drawer. The drawee's account was largely overdrawn on the 26th, but the bank had been in the habit of allowing such overdrafts for a month, the drawees making their account good on the next day, and the bank paid all their checks drawn that day, and some drawn later than the one in question, and continued to do so down to the failure on the next day. In an action of damages for negligence against defendant, a recovery was allowed for the amount of the draft with interest. *Held*, (1) that defendant was negligent and liable for the consequent damages; (2) that the facts did not justify the finding that the draft would not have been paid if duly presented; (3) but that the measure of damages was the actual loss, and evidence was admissible to reduce it to a nominal sum.

ACTION of damages for negligence in collecting a draft. The opinion states the case. The plaintiff had judgment below.

Benjamin H. Bristow, for appellant.

Henry J. Scudder, for respondent.

EARL, J. On the 22d day of March, 1866, the National Bank of Crawford County, Pennsylvania, at Meadville, made and delivered to the plaintiff, a National bank located at the same place, a sight draft for \$6,000, drawn upon Culver, Penn & Co., bankers in the city of New York. The plaintiff indorsed the draft and sent

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it by mail to the defendant, its corresponding bank in the city of New York, for collection and credit. The draft was received by the defendant on the morning of March 26, and was on the same morning presented by it to the drawees for payment. Upon such presentation it received from the drawees their check for the amount upon the Third National Bank of New York, where they kept their account, and it delivered the draft to them. It did not present the check to the bank for payment on that day; but it was sent through the clearing-house and presented for payment the next day, the 27th. Culver, Penn & Co., failed on that day, and the bank refused to pay the check. The defendant then took the check, and on the same day returned it to Culver, Penn & Co., and received back the draft for which it had been given, and then formally demanded of them payment of the draft, and caused the same to be protested for non-payment; and on the next day, March 28th, due notice of such non-payment was served by mail upon the plaintiff and also upon the drawer.

Upon these facts it cannot be disputed in this State that sufficient was done to charge the drawer. It was so decided, upon precisely similar facts, in *Turner v. Bank of Fox Lake*, 4 Abb. Ct. App. Dec. 434, and *Burkhalter v. Second National Bank*, 42 N. Y. 538. If therefore the whole duty of the defendant to the plaintiff was discharged, as claimed by the learned counsel for the defendant, by preserving the liability of the drawer upon the draft, then the judgment appealed from is wrong.

It is the duty of an agent who receives negotiable paper for collection, in case such paper is not paid, so to act as to secure and preserve the liability thereon of all the parties prior to his principal; and if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss. But this is not the utmost limit of the agent's duty and liability. He may so act as to charge all the parties to the paper, and yet become liable for a loss occasioned by his negligence. The rule which will measure the diligence which is exacted of a holder of such paper, in order to charge the prior parties, will not always measure the diligence which is required of a collecting agent in the discharge of his duty to his principal. 1 Dan. on Neg. Inst., § 330.

Suppose an agent receives for collection from the payee a sight draft. No circumstance can make it his duty, in order to charge the drawer, to present it for payment until the next day. He has

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entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein ; and that condition is in all cases complied with by presentation, demand and notice, on the next day after receipt of the draft. But suppose the agent, on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented ; what then is the duty he owes his principal, whose interests for a compensation he has agreed with proper diligence and skill to serve in and about the collection of the draft ? Clearly, all would say, to present the draft at once ; and if he fails to do this, and loss ensues, he incurs responsibility to his principal ; and yet the drawer would be charged if it was not presented until the next day. Where an agent receives a bill for collection, payable some days or months after date, in order to charge the drawer, he need not present it for acceptance until it falls due ; and if he then presents it and demands payment, and protests it, and gives the notice, the drawer is held ; and yet in such a case he owes his principal the duty to present the bill for acceptance at once, and if he fails in such duty, and loss ensues to his principal, he becomes liable for each loss. It was so held in *Allen v. Suydam*, 17 Wend. 368. That case was taken to the Court of Errors, and again appears in 20 Wend. 321, and although the judgment was reversed upon the question of damages, the same rule was laid down as to the duty and liability of the agent. The chancellor said : “ If the receiving a bill by an agent, to collect, implies an obligation on his part to take the necessary steps to charge the drawer and indorsers, by protest and notices, in case it is not accepted and paid by the drawee, I do not see why due diligence on the part of the agent, in procuring the acceptance of the drawee without delay, when it may be necessary or beneficial to the interests of the principal, should not also be implied, as it is the duty of a faithful agent to do for his principal whatever the principal himself would probably have done, if he was a discreet and prudent man. Even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent.” In the same case, Senator Verplanck said : “ It seems to be the general commercial law of the civilized world, that when a bill is payable at a day certain, the

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drawer and indorser are not discharged, if the bill is not presented until the day of payment. Yet it is still the duty of the agent for collection to present the bill for acceptance without delay, and to give immediate notice of refusal to accept." He said further: "The principle is familiar that an agent for pay is bound to use such means, care, skill and precaution as are adequate to the due execution of his trust. He must use the ordinary diligence of a skillful and prudent man in such affairs."

The rule of diligence applicable to an agent for the collection of negotiable paper, which has been stated, was fully and explicitly recognized in the case of *Smith v. Miller*, reported in 43 N. Y. 172; s. c., 3 Am. Rep. 690, and again 52 N. Y. 545. In that case the defendants sent to the plaintiffs, for the purpose of paying them for a bill of goods, a draft drawn by them upon Place & Co. of New York. On the same day the plaintiffs received the draft, they presented it to the drawees for payment, and received their check upon a New York bank for the amount, and delivered up the draft. The check would have been paid if presented on that day, but it was not presented until the next day, and, in the meantime, Place & Co. having failed, the bank refused to pay the check. Suit was then commenced by the plaintiffs against the defendants for the price of the bill of goods, and it was held that the plaintiffs could not recover, upon two grounds: 1. Because they did not protest the draft and give notice of the non-payment thereof to the drawers. 2. Because of their negligence in not presenting the check for payment upon the day they received it, although they had but two hours on that day in which to present it. The first ground does not exist here; but the last does. In 43 N. Y. 176, Judge ALLEN, after speaking of the duty which the payee of a check owes to the drawer, said: "But the duty of the plaintiffs to the defendants is not determined by that rule of commercial law. That rule has respect only to the contract and liability of the parties to the instrument. When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents." In 52 N. Y. 549, Judge RAPALLO said: "The plaintiffs had received from the drawees of the draft the means of obtaining the amount thereof, and by their

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own laches these means became unavailable, and the amount was lost both to them and the defendant."

In the cases of *Turner v. Bank of Fox Lake* and *Burkhalter v. Second National Bank*, the actions were against the drawers of the bills; and the sole question involved was whether they had been properly charged. The case of *Smith v. Miller* is not in conflict with them. That was an action against the collecting agent for breach of his duty; and what was decided in that case, or said in the opinions written therein, was in entire harmony with the law as everywhere laid down. The rule as recognized is not unjust or unreasonable or inconveniently uncertain. Here the defendant was bound to present this draft and demand the money thereon. It took a check. That placed in its hands the means of procuring the money at once. It should have presented the check for payment or certification as soon as with reasonable diligence it could, and the delay was at its peril. There is nothing in conflict with these views in *Bank of Washington v. Triplett*, 1 Pet. 25, and *West Branch Bank v. Fulmer*, 3 Penn. St. 402, to which our attention has been called. The question here discussed was not involved in those cases.

All the facts as to the draft and the check are set out in the complaint and are found in detail by the referee, and hence it cannot be said that the complaint and the findings are not sufficient to sustain the recovery, unless difficulty is found in points yet to be considered.

It is said that the proof did not warrant the conclusion that the check would have been paid if presented on the 26th day of March. It is true, that the account of Culver, Penn & Co. was largely overdrawn on that day. But the bank had been in the habit for a long time of allowing them to overdraw during any day, they depositing collaterals or making the account good when it was made up the next day. This arrangement was entirely at the discretion of the bank, and had been acted upon for a month or more. Under it the bank paid all the checks of Culver, Penn & Co., drawn on the 26th, and down to their failure on the 27th; and among the checks thus paid were some drawn after the one given to the defendant. It was therefore a justifiable conclusion that this check would have been paid if promptly presented. A cause of action was therefore established against the defendant; and the only remaining question is the rule of damages. The recovery was for the whole amount of the draft, with interest.

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In 1 Dan. on Neg. Instr., § 329, the rule as to damages in such a case is laid down as follows: "The measure of damages which the holder is entitled to recover of the bank, or other collecting agent, who has been guilty of negligence or default in respect to it, is the actual loss which has been suffered. That loss is *prima facie* the amount of the bill or note placed in its or his hands; but evidence is admissible to reduce it to a nominal sum." In *Borup v. Nininger*, 5 Minn. 523, the same rule is laid down, and it is said: "The defendants may mitigate the damages by showing either the solvency of the maker, the insolvency of the indorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff; the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff's damages." In *Allen v. Suydam*, *supra*, the judge at the trial charged the jury that as they had no knowledge of what the amount of the damage was, except from the proof of the amount of the draft, they should find a verdict for the plaintiffs for the amount of the draft, with interest. This charge was upheld by the Supreme Court, and the rule was there laid down that the amount of the bill or note, in such a case, is the *prima facie* measure of damages. On account of this charge, the judgment was reversed in the Court of Errors. 20 Wend. 321. Two opinions were delivered, one by the chancellor for reversal, and another by Senator Verplanck for affirmance. These learned jurists did not differ materially as to the rule of damages, but they differed in its application to the facts of that case. The chancellor, writing the prevailing opinion, laid down the rule thus: "Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty, or where by the negligence of the agent, the liability of a drawer or indorser, who was apparently able to pay the bill, has been discharged, so that the owner of the bill cannot legally recover against such drawer or indorser, I admit the agent, by whose negligence the loss has occurred, is *prima facie* liable for the whole amount thereof, with interest, as damages; unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner, in consequence of such negligence;" and he claimed that the facts in that case did not clearly show that the loss of the plaintiffs was the whole amount of the bill; and hence he reached the conclusion that the charge of the trial judge was

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wrong, and that a new trial should be granted, "to the end that no more damages may be recovered than such as a jury may believe it probable, from the evidence adduced, that the plaintiffs may have sustained from the negligence."

When the agent so deals with the draft as to secure and preserve to his principal all his rights and remedies against the prior parties to the bill, he is liable only for the actual or probable damages which his principal has sustained, in consequence of his negligence; and so the rule was recognized to be in *Van Wart v. Woolley*, 5 Dowl. & Ryl. 374. In *Bank of Scotland v. Hamilton*, cited in *Allen v. Suydam*, where the agent by his negligence in not sooner presenting a bill for acceptance became *prima facie* liable for the whole amount thereof, he was allowed in mitigation of damages a dividend which his principal would be entitled to out of the drawer's estate in bankruptcy.

In all these cases, the negligence of the agent being established, it is a question of damages, and the agent may show, notwithstanding his fault, that his principal has suffered no damages; and the recovery can then be for nominal damages only. He may show, in reduction of the damages, that if he had used the greatest diligence, the bill would not have been accepted or paid, or that his principal holds collaterals, or has an effectual remedy against the prior parties to the bill.

The defendant did not receive the check from the plaintiff and undertake to collect it; and this case must not be disposed of upon that basis. It received the draft for collection; and it was in reference to that that it came under obligation to the plaintiff to act with diligence. It presented the draft for payment, and for the purpose of paying the same, the drawees delivered to it an order upon a neighboring bank for the amount, and instead of getting the money upon the order at once, as it could have done, it negligently delayed until it could not. It had no more right to delay presenting the order for the money than it would have had to decline, when the draft was presented, to receive the money until the next day, in case the drawees had expressed a willingness to pay then. The *gravamen* of the plaintiff's complaint is that the defendant acted so negligently that it did not get payment of the draft when it had the means under its control, and the power, by the exercise of reasonable diligence, to do so.

But this fault of the defendant, so far as disclosed by the undis-

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puted facts of this case, caused the plaintiff none but nominal damage. The defendant, as shown above, caused the drawer to be charged, and secured and preserved against it all the rights and remedies of the plaintiff; and the presumption, in the absence of proof, is that the drawer was solvent, and responsible for the amount of the draft. *Ingalls v. Lord*, 1 Cow. 240; *Allen v. Suydam*, *supra*. But in this case we need not rest upon this presumption, as the complaint alleges that the draft could be collected from the drawer, if properly charged. The result is that the plaintiff has recovered against the defendant, as damages for its negligence, the full amount of the draft. But the draft is not by this judgment transferred to the defendant, and it is not subrogated to plaintiff's rights and remedies thereon against the drawer; and the plaintiff still holds the draft, and for aught that appears in this case, can enforce it, or has enforced it, for the full amount against the drawer. To justify such judgment, the plaintiffs should have shown that the draft was wholly worthless, or that for some reason the responsibility of the drawer thereof was wholly unavailable to it. The plaintiff is entitled to indemnity, and no more, for the loss caused by the fault of the defendant, and it must show the extent of such loss.

It was said by the learned counsel for the plaintiff, upon the argument before us, that by the law of Pennsylvania the drawer was not charged upon the draft by what was done by the defendant. But that law was not proved; and in the absence of proof, we must assume that the common-law rule prevails there which prevails here. It was also stated that the plaintiff had sued the drawer upon the draft and failed to recover, because it was not properly charged. But there is also no proof of that.

Therefore, for the error as to the damages, the judgment must be reversed and a new trial granted, costs to abide event.

Judgment reversed.

All concur, except FOLGER and MILLER. JJ., not voting, and CHURCH, C. J., absent.

COMER V. CUNNINGHAM.

(77 N. Y. 391.)

Sale — delivery — foreign statute — bona fide purchaser.

Williams bought of plaintiffs, at Savannah, Georgia, 118 bales of cotton, giving therefor his checks on Bryan & Hunter, of the same place, having previously put the latter in funds by his draft on defendants to their order, and otherwise. Plaintiff delivered sixty bales to Williams, and it was shipped by Williams to defendants, at New York, the bill of lading being in his name and having attached thereto the draft indorsed by B. & H. Defendants paid the draft on presentation, the amount being more than the price of the sixty bales, and the transaction being according to their custom with Williams and received the cotton without knowledge of any claim on it. One of the checks on B. & H., being post-dated, was dishonored, and plaintiffs brought replevin for forty-five bales, part of the sixty, relying on a statute of Georgia which provides that "cotton, rice, and other products sold by planters and commission merchants on cash sale shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, although it may have been delivered into the possession of the buyer." *Held*, that the action could not be maintained; that assuming that the statute was part of the contract, it simply made the delivery conditional, affected nothing but the delivery, and could not affect the rights of a *bona fide* purchaser in this State; and the sale being absolute and unconditional, title passed to defendants.

REPLEVIN. The opinion states the facts. The defendant had judgment below.

Erastus Cook, for appellant. The sale being conditional the contract of sale remained executory until payment was made. *Herring v. Hoppock*, 15 N. Y. 409; *Strong v. Taylor*, 2 Hill, 326; *Ballard v. Burgett*, 40 N. Y. 314; *Coggett v. N. H. R. R. Co.*, 69 Mass. 548. The factors' act has no application to this case. Laws 1830, p. 203; *Covill v. Hill*, 4 Den. 330; *Mechanics and Traders' Bank v. F. and M. Bank*, 60 N. Y. 40; *First Nat. Bank of Toledo v. Shaw*, 61 id. 283; *Kinsey v. Leggett*, Court of Appeals, not yet reported; *Deshon v. Bigelow*, 8 Gray, 160; *Cook v. Beal*, 1 Bosw. 497-504; *Hatfield v. Phillips*, 9 M. & W. 650.

Benjamin G. Hitchings, for respondent.

Comer v. Cunningham.

RAPALLO, J. The forty-five bales of cotton claimed by the plaintiff in this action were part of a lot of sixty bales which were on the 18th of November, 1870, shipped from Savannah, Georgia, to the firm of James B. Cunningham & Co. of New York, by F. S. Williams, a business correspondent of that firm, who was in the habit of shipping cotton to them and drawing against it for advances thereon.

A bill of lading of the cotton on board the steamer San Salvador, with a sight draft attached thereto, drawn by Williams upon Cunningham & Co. for \$4,500, payable to the order of Bryan & Hunter, of Savannah, and indorsed by them, were presented to Cunningham & Co., at New York, by the agents of Bryan & Hunter, on the 21st of November, 1870, and Cunningham & Co. thereupon paid the draft and received the bill of lading, in the usual course of business. The payment of the draft was made as an advance upon the cotton on the faith of the bill of lading. In the bill of lading Williams was named as the shipper of the cotton. It was deliverable to order and the bill of lading was duly indorsed. Cunningham & Co. had no knowledge of any claim of any person on the cotton, and upon the uncontroverted evidence they stand in the position of *bona fide* purchasers of the cotton, or lenders thereon in good faith. The defendant is the representative of Cunningham & Co.

Cunningham & Co. obtained possession of the cotton under the bill of lading and put it in store, where it remained until the 25th of November, when the forty-five bales in question were replevied in this action by Bates & Comer of Savannah.

The grounds upon which they claim to be entitled to take the cotton are, that the sixty bales shipped by Williams as above stated were part of a lot of 117 bales sold by the firm of Bates & Comer (of whom the plaintiff is survivor) to Williams, at Savannah, in November, 1870, for cash. The price of the whole lot was \$8,676.20. The plaintiff testified that the 117 bales were delivered to Williams on the 18th of November, 1870, and that on the next day, Saturday, the 19th, Williams gave to plaintiff two checks on Bryan & Hunter; one for \$6,000, which was paid, and one for \$2,676.20, which was not paid. It appears that the sixty bales shipped to Cunningham & Co. were on the 18th of November delivered by the sellers by direction of Williams, at the compress, being the place where cotton was pressed by the steamers, preparatory to shipment, and that they

were on the same day laden on board the steamer, and the bill of lading before mentioned was issued to Williams.

He thereupon drew the \$4,500 draft on Cunningham & Co., and presented the same, with the bill of lading, to Bryan & Hunter who discounted the draft, and against the proceeds of this discount and other moneys in their hands Williams drew the before-mentioned checks on Bryan & Hunter for \$6,000 and \$2,676.20 in favor of the plaintiff's firm, for the purpose of paying for the 117 bales, and plaintiff's firm on the next day collected the \$6,000 check as before stated. Williams testifies that the check for \$2,676.20 was dated some days ahead, and also that he informed plaintiff of the shipment at the time, but as these facts are controverted they are not taken into consideration.

No condition appears to have been attached by the parties to the delivery of the cotton on the 18th of November, nor is it alleged that Williams obtained possession of it by means of any fraud. It was voluntarily and absolutely delivered by the vendors, in the usual course of business, and no question would arise as to the title of Williams or of Cunningham & Co., but for a statute of the State of Georgia, upon which the plaintiff relies to maintain this action.

This statute provides that "cotton, rice, and other products sold by planters and commission merchants on cash sale shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, although it may have been delivered into the possession of the buyer."

It is not claimed on the part of the plaintiff that this statute has any force, *ex proprio vigore*, in this State, but the claim made is, that the statute being the law of the State where the parties resided, and the property was, and where the contract was made and to be performed, it entered into the terms of the contract, and became a part of it, to the same extent as if its essential provisions had been written into it.

Assuming this position to be correct, the questions arise, first, what was the nature and effect of the dealing between the vendors and Williams, as construed by including the provisions of this statute as part of the contract? and secondly, what are the rights of a *bona fide* purchaser from Williams?

The plaintiff contends that the effect of incorporating the statute into the contract was to make the sale to Williams a conditional sale, but I apprehend that this is not an accurate view. The sale

was a present, absolute sale; not executory nor depending upon any contingency. The obligation of the buyer to pay was absolute, and the property was at his risk. If it had been destroyed, or lost on the voyage, his obligation to pay would not have been discharged, notwithstanding that as between him and his vendors the title had not passed. The statute did not purport to affect any of these rights, or to attach any condition to the contract of sale. It simply made the delivery conditional, and if written into the contract would affect nothing but the delivery. The property in that case stood in precisely the same condition after its delivery to Williams at Savannah, as if the transaction had taken place in this State, and the vendor on a cash sale had expressly attached to the delivery a condition that the title should not pass until payment of the price. Such transactions are of common occurrence in this State, and the rights of the vendor and vendee, and of *bona fide* purchasers from the vendee, are well-settled by the adjudications of our courts. Where goods are sold to be paid for, in cash or by notes on delivery, if delivery is made without demand of the notes or cash the presumption is that the condition is waived, and a complete title vests in the purchaser; but this presumption may be rebutted by proof of acts or declarations and circumstances showing an intention that the delivery shall not be considered complete until performance of the condition, and the question of intention is one of fact. But after actual delivery, although as between the parties to the sale such delivery be conditional, a *bona fide* purchaser from the vendee obtains a perfect title (*Smith v. Lynes*, 5 N. Y. 41; *Fleeman v. McKean*, 25 Barb. 474; *Beavers v. Lane*, 6 Duer, 238), though a voluntary assignee of the purchaser does not. *Haggerty v. Palmer*, 6 Johns. Ch. 438. The statute of Georgia having no operation here as law, its only effect can be to place the parties in the same position as if it had been stipulated at the time of the delivery to Williams that such delivery should be conditional upon payment, and we must apply to the case the law of this State which protects a *bona fide* purchaser from one to whom goods have been conditionally delivered, against the claims of the original vendor. *Rawls v. Deshler*, 3 Keyes, 572, is very much in point. Deshler sold a quantity of corn to Griffin, and gave him an order on the elevator to deliver the corn to him "subject to my order till paid for." This delivery was clearly conditional. The Georgia statute was actually incorporated into the contract, and neither Griffin nor his execution

creditor or voluntary assignee, could have resisted successfully a claim of the vendor to retake it. Yet this court held that Griffin having shipped the corn and drawn against it, the drawees, having paid the draft on the faith of the bill of lading, were protected as *bona fide* purchasers, and also under the factor's act.

In *Wait v. Green*, 36 N. Y. 556, the vendor of a horse delivered it and took from the purchaser a note at foot of which was a memorandum signed by the vendee: "Given for one bay horse. The said Mrs. Comins (the vendor) holds the said horse as her property until the above note is paid." This court held that a *bona fide* purchaser from the vendee obtained a good title. This case is supposed to be in conflict with *Herring v. Hoppock*, 15 N. Y. 409, *Ballard v. Burgett*, 40 id. 314, and *Austin v. Dye*, 46 id. 500. If the transaction is to be regarded as a conditional sale, the case is in conflict with the two last cited cases in 40 and 46 N. Y., but it can well be treated as a case only of conditional delivery. In *Ballard v. Burgett* it was held that where the sale was conditional, no title passed to the vendee, because there was no sale until the condition was performed, and the so-called vendee was a mere bailee with a contract for a future sale. That the property while in his hands was at the risk of the vendor, and the so-called vendee was not liable for the price. That he had no title to the property and could convey none, even to a *bona fide* purchaser; that there was no sale, and he had a mere possession, and that the finding of the referee that the agreement was that the property was to remain the property of the plaintiff till the \$180 were paid, was incompatible with the finding of a sale, and the true construction of the contract was that the oxen were delivered under an agreement that when the party receiving them should pay \$180, the party delivering them would sell the oxen. *Wait v. Green*, was distinguished, and it was held that under the circumstances of that case if the horse had died before payment of the note such death would have been no defense to the note, and that was a conclusive circumstance showing that the condition expressed in the note was a mere security for the price. Whereas in the case at bar, had the oxen died, no action could have been maintained for the purchase-money. The cases holding that where there is a sale and a conditional delivery, a *bona fide* purchaser from the vendee acquires a good title discharged of the lien for the purchase-money, are cited, but they are not attempted to be overruled nor are they questioned

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In *Austin v. Dye*, 46 N. Y. 500, the principle of this decision is clearly stated, and is, that one having possession of personal property as bailee, with an executory and conditional agreement for its purchase, the condition not having been performed, can give no title to a purchaser, though the latter acts in good faith and parts with value without notice of the want of title. In that case the alleged vendee was to pay hire for the oxen until he should pay a specified sum in a specified manner in lumber, and then he was to become the owner. Until then there was no sale, and they were at the risk of the bailor, who received hire for their use. The sale was executory as that in *Ballard v. Burgett* was construed to be. In *Herring v. Hoppock*, 15 N. Y. 409, and *Strong v. Taylor* 2 Hill, 326, the question of the rights of a *bona fide* purchaser did not arise and it is therefore immaterial to consider whether those were cases of conditional sale or conditional delivery. In the present case it cannot be pretended that the sale was executory or conditional. It was an absolute unconditional sale, and the greater part of the purchase-money, much more than sufficient to cover the price of the bales received by the defendant's firm, had actually been paid. There is no feature, favorable to the plaintiff, by which he can be distinguished from *Smith v. Lynes*, 5 N. Y. 41, and the cases there referred to, and that case and *Rawls v. Deshler*, 3 Keyes, 572, establish that a condition that the title shall not pass until payment, when attached to a delivery upon an actual completed contract of sale, is available only as against the vendee and persons claiming under him, other than *bona fide* purchasers without notice.

This view renders it unnecessary to examine that branch of the defense which rests upon the factor's act. The case falls literally within the provisions of the act, but it has been said in numerous cases that the first section of the act applies only when the shipment has been made with the consent of the owner, in the name of another person. There is no adjudicated case which rests upon that proposition, and it may be an open question whether under the circumstances of the present case the statute would not be a protection, but as the ground already discussed is sufficient to decide the case time will not be consumed in that inquiry.

The judgment should be affirmed.

Judgment affirmed.

All concur.

NATIONAL TRUST COMPANY V. GLEASON.

(77 N. Y. 400.)

Action — money had and received by forgery — essentials of — married woman — witness — conviction of felony in another State.

In an action against several, including a married woman, for money had and received by one by means of a forgery to which all were parties, it is necessary to a recovery against all, to show that all were interested in the money received; mere complicity in the forgery will not charge any in such an action; and the married woman could not be rendered liable without showing a contract by her in her separate business, or for the benefit of her separate estate, or for which she had charged her separate estate.

The conviction of one of felony in another State does not disqualify him as a witness in this. (*See note, 639.*)

ACTION for money had and received. The opinion states the case. The plaintiff had judgment below

Ira Shafer, for appellants.

Frederick Smyth, for respondent. Defendants are jointly and severally liable to respond for the damage arising out of the illegal acts, or the acts of any one of them in furtherance of the conspiracy. 3 Greenl. Ev., §§ 89, 97; 1 Whart. Am. Crim. Law, § 702; *People v. Mather*, 4 Wend. 229; 2 Whart. Am. Crim. Law, §§ 2351, 2352; 3 R. S., 988, § 33; *id.* 985, §§ 9, 10; *Commonwealth v. Hall*, 4 Allen, 307; *Cole v. Cole*, 50 How. Pr. 60; 1 Greenl. Ev., 423, § 376; Code of Civil Pro., § 838. The motion to dismiss the complaint as against Mrs. Gleason was properly denied. 3 R. S. 996, §§ 17, 18; Cooley on Torts, 115; 2 Bish. Law of Married Women, § 258; *Cassin v. Delany*, 38 N. Y. 178.

RAPALLO, J. The complaint in this action avers that about the 5th of July, 1873, the defendants were possessed of certain documents purporting to be forty-two first mortgage bonds of the Buffalo, New York & Erie Railroad Company, and that they obtained and received from the plaintiff \$30,000 and on the deposit of said pretended bonds with the plaintiff as security, but the plaintiff afterward discovered that said bonds were forged and worthless, wherefore it alleges that the defendants have had and received to and for

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the use of the plaintiff the sum of \$30,000, and are indebted to the plaintiff in that sum. The complaint also contains averments excusing the plaintiff from tendering the bonds to the defendants, and demands judgment for the \$30,000 and interest.

The answers of the defendants who have answered deny the material allegations of the complaint, and the answer of the defendant Amelia A. Gleason sets up, in addition, that at the times of the transactions alleged in the complaint she was a married woman, the wife of the defendant Valentine Gleason.

The action was purely *ex contractu*, and one which under the common-law system of pleading would have been denominated an action of assumpsit for money had and received. No tort is alleged. There is no averment that the defendants had any connection with, or knowledge of the forgery of the bonds, or that they were engaged in any conspiracy to defraud the plaintiff. No right or claim to damages for any wrong is set up, but simply an indebtedness for money had and received to the use of the plaintiff, or perhaps for money borrowed.

To maintain such an action it is necessary to establish that the defendants have received money belonging to the plaintiff or to which it is entitled. That is the fundamental fact upon which the right of action depends. It is not sufficient to show that they have by fraud or wrong caused the plaintiff to pay money to others, or to sustain loss or damage. That is not the issue presented in the action.

The plaintiff introduced evidence, which, as is claimed, establishes that all the defendants were acting in concert, and were guilty in a greater or less degree of complicity in the forgery of the bonds. That the bonds were passed off upon the plaintiff by the defendant Charles Rolston, who received from the plaintiff the money advanced by it, and afterward absconded.

Upon this evidence (throwing out of view the special questions raised as to the liability of the defendants who were married women, and of those defendants as to whom it is claimed that the evidence was insufficient to connect them with the forgery), it was a question of fact for the jury whether Rolston, in receiving the money, was acting in behalf of those engaged with him in the forgery, and was carrying out the common purpose with the authority and for the benefit of all his confederates. It was not necessary to establish that each defendant personally received a

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share of the proceeds of the bonds. If the whole proceeds were received by a common agent, those for whose benefit it was thus received were jointly liable for the entire sum; and this result would not be varied by the circumstance that the common agent failed to account, and absconded with the proceeds.

It was nevertheless a question of fact and not of law whether the several defendants who were guilty of complicity in the forgery were interested in the money received by Rolston. Mere complicity in a forgery or other crime does not, as matter of law, render every guilty party liable in a civil action, *ex contractu*, for money had and received, or as borrowers, to every person who has been defrauded of money by means of such crime. To charge a party in an action of that character the receipt of the money by him, directly or indirectly, must be established. His complicity in the crime is not the cause of action, but only an item of evidence tending to establish his interest in the proceeds.

These questions are fully presented in the case at bar, by exceptions to the charge, and by requests to charge. As to the defendants, Mrs. Gleason and H. S. Corp, they were also presented by a motion for a nonsuit. Among other grounds specified on that motion were the third, that as to Mrs. Gleason, who was a married woman, the plaintiffs had not shown that she had received any portion of the money obtained by Rolston from the plaintiff, or that any portion of it went to the benefit of her separate estate, and the sixth, that there was no evidence that either of the defendants participated in the money obtained by Rolston from the plaintiff. Before the charge was delivered the counsel for all the defendants requested the court to charge, among other things; second, that to entitle the plaintiffs to a verdict they must establish that the defendants directly or indirectly aided or assisted, or were in some way knowingly implicated in obtaining, through Rolston, the money from the plaintiffs; ninth, that if the jury believed that any defendant merely knew of the alleged intended crime of forgery, but did not participate in it or receive any of the proceeds, the jury would not be justified in finding a verdict against him. The counsel for defendants Mrs. Gleason and Corp requested the court to charge: Third, that the jury could not find a verdict against Mrs. Gleason unless they were satisfied on the evidence that the money obtained on the bonds passed to the plaintiff, or some part thereof was received by her and went to the benefit of her separate

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estate; fourth, that there was no direct evidence that Mrs. Gleason received any part of the money, or that any part of it went to the benefit of her separate estate; eighth, that before the plaintiff can recover of either of the defendants in this action it must show that such defendant received some portion of the money obtained from the plaintiff on the forged bonds, either personally or by an agent, and if by an agent, the agency must be proved, and in case of the absence or insufficiency of such proof as to any defendant, such defendant was entitled to a verdict.

The court charged the jury, among other things, that the law of the case was, "that those who took part, a guilty part, no matter what that part was, how small or how great in the commission of the forgery of the bonds of the Buffalo, New York and Erie Railway Company, were responsible in this case for the money that was obtained on any part of these bonds by the defendant Rolston. That it was immaterial what the part taken was, provided any thing was done by any one of the parties for the purpose of assisting in accomplishing the success of the forgery; that each was responsible with the other."

In view of the requests made, directing the attention of the court to the point, it is very clear that the court held and instructed the jury as the law of the case, that the mere fact of a person taking a guilty part, to any extent whatever, in the commission of a forgery, or in aiding in it, was sufficient to render him legally responsible, in an action for money had and received, to any person advancing money on the forged security; and the case was in substance submitted to the jury, to be determined on the same principles as if the defendants were on trial on an indictment for forgery, or a conspiracy to defraud. However desirable it may be to render judgments against persons guilty of such offenses, in any form of proceeding in which they may be brought before the court, whether civil or criminal, the law does not permit that indulgence of our desire to administer justice in the abstract, but confines us to prescribed forms of proceeding, applicable to particular cases. The right to a civil remedy is not, under our statute merged in the crime, but the civil right of action must be made out. The alleged cause of action in this case is the receipt by the defendants of the plaintiff's money, and I think the eighth request to charge correctly stated the law, and the charge should have been given, viz.: That to maintain the action the plaintiff must show that the defendants

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received some portion of the money either personally or by an agent, and if by an agent, the agency must be proved. What should be sufficient evidence to authorize the jury to infer such an agency is a different question. This request was not granted, but as it was made only on behalf of Mrs. Gleason and Corp, the exception is available only to them. The exception to the charge, however, that all those who took any guilty part in the commission of the forgery were liable for the money, was taken in behalf of all the defendants. That the meaning of the judge was that a guilty complicity in the forgery, irrespective of any actual or constructive receipt of the proceeds, would be sufficient to sustain this action, is clearly shown, and was conveyed to the jury by the answer of the judge to the second request of all the defendants, viz.: that to entitle the plaintiffs to a verdict they must establish that the defendants directly or indirectly aided, assisted, or were in some way knowingly implicated in obtaining through Rolston the money from the plaintiffs. To this request the judge replied that he so charged with this modification: "That when persons are engaged in the commission of a felony, the law is not very particular in ascertaining how far the consequences of that felony reach, to the knowledge of those persons, but if they commit a felony they are responsible for all the natural consequences that flow from that. Why do men forge bonds? They forge them for the purpose of having money obtained from honest people upon them. Now if bonds being forged, even an unknown person should obtain money upon them, who is legally responsible? Why, the person who forged the bonds."

The rule was thus broadly laid down that any person who forges or aids in the forgery of an instrument is liable in an action *ex contractu*, for money had and received, to any person who may advance money upon the forged paper, without regard to the question who got the money, and even if the person is unknown. However sound the rule of responsibility laid down may be in respect to the criminal offense, or perhaps as applicable to an action for damages for an injury caused by the crime, it cannot be sustained as applicable to an action for money had and received or money borrowed. This modification was excepted to on behalf of all the defendants. To the ninth request on behalf of all the defendants, that if the jury believed that any defendant merely knew of the alleged intended crime of forgery, but did not partici-

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pate in it or receive any of the proceeds, the jury would not be justified in finding a verdict against them, the judge replied: "That is the law, gentlemen, if you can imagine such a case, and if a party stands by during the commission of a felony or a part of it, and merely knows that it is going on and does not participate in it. There must be some assistance, by the presence, or by some act or advice or help of the party, to implicate in the crime, and if there is any act, as I said before — any act or advice or assistance given, which is given for the purpose of effecting the felony, it makes the party doing that, or saying that, guilty of complicity."

That part of the request which touches the subject of the receipt of the proceeds is not noticed, and in connection with the other parts of the charge it clearly appears that in the view of the learned judge, any advice or assistance by presence, by saying any thing, or otherwise, in the commission of a felony, whereby a third party is defrauded of money, is sufficient to make the offender liable in this form of action, no matter who receives the proceeds.

Not a single authority has been cited in support of the theory on which the case was submitted to the jury. All the authorities cited by the plaintiff's counsel relate to actions for conspiracies and torts, and in his points he treats this as an action for damages for a conspiracy. But it is impossible to sustain this position, as the complaint contains no allegations showing any wrong done by the defendants, but rests purely and simply upon the allegation that the defendants received the money which was advanced upon the forged bonds, and are indebted for it as money had and received to the plaintiff's use, and the point is expressly taken, throughout the trial, that the action cannot be maintained without proof of this essential allegation. If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible injury, or waiving the force, he may maintain trover for the wrong, or waiving the tort altogether, he may sue for money had and received. POLLOCK, C. B., *Rodgers v. Maw*, 15 M. & W. 448. And the rule is the same here, even if the goods are stolen. But to maintain the action for money had and received, the goods must have been turned into money and the defendant must have received the proceeds, directly or indirectly. To maintain such an action it is necessary that a certain amount of money belonging to one person should have improperly come into the hands of another, and there

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must be some privity between them. Add. on Cont. 1062; Greenl. Ev., §§ 120-122. It is difficult to conceive upon what legal principle a wife who merely aids and abets her husband in the commission of a forgery, or a mechanic who is employed to execute some part of the work and is paid for his services, having no concern with or interest in the fruits of the crime, can be held liable in an action *ex contractu* for money advanced upon the forged instrument, whatever may be their responsibility in a criminal prosecution for the offense.

As to Mrs. Gleason, an action *ex contractu* can be maintained against her only by showing that she is liable upon some contract made in a separate business carried on by her, or with reference to her separate estate, or for which she has charged her separate estate; and we think the point is well taken that there is no evidence of any such contract on her part, or at least that the question should have been submitted to the jury as requested. If there were evidence showing that she had received any part of the money, and the jury had so found, she might possibly have been liable, on the ground that the money went to the benefit of her separate estate, but no such question was submitted. The only evidence affecting her, to which our attention is called, was to the effect that she was the wife of one of the conspirators and was acquainted with the others, and that they were in the habit of meeting at the house where she resided with her husband, and part of the forging was done there, and that she was present when the forged seal of the Buffalo, New York & Erie Railroad Company was delivered to her husband and examined by him, and that the forged cancelling stamp was delivered to her in a parcel to be delivered to her husband, though it does not appear that she knew what it was. These circumstances may tend to show some knowledge on her part of the transaction, but do not establish that she received any money for the benefit of her separate estate, nor make out a case of liability on her part in an action upon an implied contract:

The point relating to the incompetency of Pettis as a witness, by reason of his conviction of a felony in the State of Massachusetts, is covered by the decision of this court in the late case of *Sims v. Sims*, 75 N. Y. 466, in which it was held that a conviction in another State did not render a person incompetent to be a witness here. We do not think that the circumstance, that at the time

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Pettis was examined as a witness the term of his sentence had not expired, distinguishes this case from that of *Sims v. Sims*.

We have not examined the numerous exceptions to rulings upon evidence, nor to the refusal to dismiss the complaint as to particular defendants, on the ground of the insufficiency of the evidence to connect them with the crime, as, for the reasons already stated the judgment must be reversed. Many of the exceptions are covered by the views before expressed, which show that proof of a conspiracy between the parties and of their complicity in the crime, and of any facts tending to show that Rolston in receiving the money was acting as the common agent or for the common benefit of all and with their assent, were competent for the purpose of establishing that the defendants received the money for which they are sued, and that the payment of it to Rolston was virtually a payment to all for whom he was acting. These were the material questions which should have been submitted to the jury.

The judgment might be sustained against the defendant Rolston, as the uncontroverted evidence shows that he received the proceeds of the bonds, but as it is stated that he was not served with process and has not appeared, a separate judgment against him alone cannot stand.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur.

NOTE BY THE REPORTER.—In *Sims v. Sims*, cited in the principal case, the court, per RAPALLO, J., said: "I think it quite clear that the disqualification created by this statute is consequent only upon a conviction in this State. It is found in that part of the Revised Statutes which relates to crimes and their punishment, and is in the nature of an additional penalty consequent upon the sentence. Although the disqualification incidentally affects parties in civil litigations wherein the testimony of the convict may be material, and serves as a protection to those against whom his testimony may be sought to be used, yet the provisions which inflict it must be regarded as a part of the criminal law of this State. Furthermore, the provisions requiring that the offense be a felony, and defining the term felony as used in that act, indicate that the conviction referred to is a conviction had within this State. Though petty larceny was a felony at common law, it has been held that a conviction of that offense does not constitute a disqualification in this State, but the offense must be a felony as defined in the statute above cited. *Carpenter v. Nixon*, 5 Hill, 280; *Shay v. People*, 22 N. Y. 317. Crimes might be felonies in other States which did not fall within our statutory definition.

"It was not shown that according to the laws of the State of Ohio a person convicted of the offense of which this party was convicted was incompetent to be a witness. But if this fact had been shown, or could be presumed, it could make no difference. There is some conflict of authority on this point. In *Chase v. Blodgett*, 10 N. H. 24, and *State v. Chandler*, 3 Hawks, 893, it was held that one convicted in another State, of an offense, com

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viction of which rendered him incompetent in the State where convicted, and would have had the same effect in the State where he was offered as a witness had he been convicted there, was also disqualified in the latter State, but in *Commonwealth v. Green*, 17 Mass. 515, the contrary was held. The case last referred to rests upon the ground that the disqualification is in the nature of an additional penalty, following and resulting from the conviction, and cannot extend beyond the territorial limits of the State where the judgment was pronounced. That the constitutional provision requiring that full faith and credit be given to the records, etc., of other States does not require that the same effect be given to them as in the State where rendered, as it was left to Congress to prescribe their effect, and also that this constitutional provision does not apply, and is not in its nature applicable, to criminal proceedings. Greenleaf says (Greenl. Ev. 876), that the weight of modern opinion seems to be that personal disqualifications, arising, not from the laws of nature, but from positive law, especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originated, and Story's Conf. of Laws, §§ 92, 104, sustains the same view. I think this doctrine applicable to the question now in hand and that there is nothing in the Constitution of the United States which prevents such application, or requires that the personal disabilities, such as incompetence to testify, or to vote, which may be imposed upon a person convicted of crime in one State, should follow him and be enforced in all the others. If such were the operation of the constitutional provision the qualifications of witnesses called in our courts and of voters at our elections might be made to depend upon the laws of other States instead of our own. In the New Hampshire and North Carolina cases, referred to (10 N. H. 22, and 3 Hawks. 893), this argument is met by the contention that it is the crime and not the judgment which incapacitates the witness, and that the incapacity is not prescribed as a punishment for the crime, but because by the commission of it the criminal has shown himself a person unfit to be trusted to give testimony affecting the rights of others. That the judgment is required only for the purpose of establishing the fact of the crime by conclusive evidence, and that the constitutional provision requires that the same credit be given in every State to the judgment of a sister State to which it is entitled in the State where rendered.

"Assuming that this constitutional provision applies to convictions for crimes (which is denied in the Massachusetts case) the answer to the position stated is twofold. First, that whatever reason may lie at the foundation of the law, the law is that the sentence, and not merely the commission of the crime, disqualifies the witness. The crime may be admitted or proved ever so conclusively, even by record, without having that effect. A judgment rendered in a civil action to which plaintiff, defendant and witness were all parties, finding the witness guilty of forgery, grand larceny, or any other felony, would not disqualify. Such a record might exist, as in cases of justification of libel, actions to cancel forged instruments, etc. The disability to testify can only follow conviction and sentence in a prosecution for the crime. Secondly, a record of conviction for a crime is not conclusive evidence in a civil action of the facts upon which it was based. There is a great weight of authority against its being admissible at all, except as evidence of the fact of conviction, where that fact is material. To give to a foreign record of conviction the effect of conclusive evidence in a civil action, of the fact that the party convicted committed the crime, would be to give it greater credit than the judgment of one of our own courts would be entitled to. Greenleaf states it as a general rule that a record of conviction of a crime is not admissible in evidence in a civil action, to prove the fact on which it was rendered. 1 Greenl. Ev. 537. And so it has been held in many cases from *Gibson v. McCarthy*, Cas. temp. Hard. 811 to *Mead v. City of Boston*, 3 Cush. 404. The same rule prevails in Connecticut. Swift's Ev. 20. In other cases however it has been held that such judgments may, under some circumstances, be received in civil actions as *prima facie* evidence of the fact of guilt, but never as conclusive, or as estopping the party convicted from proving his innocence. These will be referred to in considering the remaining point in this case. One strong reason assigned for not holding them conclusive is the absence of any mutuality in the estoppel. 1 Greenl. Ev., § 553; 2 Phil. Ev. 50. The confusion which is sometimes perceptible in the cases on this subject results from losing sight of the distinction between the purposes for which such judgments are offered, whether as evidence of the fact of conviction and judgment, or of the fact of the guilt of the party. Such a judgment is conclusive for the purpose of establishing the fact that it has been rendered, and all the legal conse-

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quences which flow from it. Therefore, when by law the fact of conviction disqualifies a witness, the record, when introduced for that purpose, is unimpeachable and the evidence is for the court and not the jury. When offered for the purpose of establishing the fact of guilt there is a great weight of authority for the proposition that it is not admissible in a civil case, but it is well settled that if admitted it is only *prima facie* evidence."

The question was elaborately considered in *State v. Candler*, 3 Hawks, 393, TAYLOR, C. J. and HENDERSON, J., pronouncing separate opinions in favor of the exclusion, but, HALL, J., dissenting on the point in question. The tenor and basis of the prevailing opinions are correctly stated by RAPALLO, J., in *Sims v. Sims*. TAYLOR, C. J., concludes: "Wherever the common law forms the basis of the jurisprudence of a State, and a witness is disqualified either by that or by statute, of which proper evidence is exhibited to a court here, I can see no reason wherefore the witness shall not be excluded."

In *Clarke's Lessees v. Hall*, 2 Har. and McH. 378, it was briefly held, that parol evidence was admissible to show that a witness had been convicted of felony in England and transported to Maryland in 1750.

The like doctrine was laid down by PARKER, C. J., in an exhaustive opinion, in *Chase v. Blodgett*, 10 N. H. 22. The court say: "The witness is excluded, not to punish him for the crime he has committed but because, by the commission of it, he has shown himself a person unfit to be trusted to give testimony affecting the rights of others, and the exclusion, it seems to us, is no more to be regarded as a punishment of the individual, than the exclusion of a person on account of his disbelieve in the existence of a Supreme Being is to be regarded as a punishment of his atheism."

The opposite view was adopted in *Commonwealth v. Green*, 17 Mass. 539, PARKER, C. J., delivering the opinion, and examining the subject at great length. This is based on the idea that the clause in the Federal Constitution, relating to the faith and credit to be given to judgments of other States, does not apply to judgments in criminal proceedings. The court said: "If it be said that it will be dangerous to the lives and reputation of the citizens that foreigners, who have been rendered infamous abroad, should be admitted to testify against them, the answer is that their former condition and character may be made known to the jury to enable them to judge of their credibility, and this without depriving them of any valuable personal right by reason of their conviction abroad."

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(N. Y. 427.)

Bankruptcy — discharge — "fiduciary capacity."

A discharge in bankruptcy bars an action for the conversion of securities pledged to the defendant as collateral to a loan, the cause of action not being a debt created by fraud, nor while acting in a fiduciary capacity, within the meaning of the bankrupt act. (*See, note, p. 645.*)

A PPEAL from order denying motion to vacate an order of arrest.
The opinion states the case.

J. M. Guiteau, for appellants.

C. Bainbridge Smith, for respondents. The defendant's discharge in bankruptcy does not affect the order of arrest or operate

to release the defendants from the plaintiffs' cause of action. Rev. Stat. (U. S.), 993, § 5117. The debt of the bankrupts was not only created by fraud, but while acting in a fiduciary character. *White v. Platt*, 5 Den. 269; *Stand. Sugar R. v. Dayton*, 70 N. Y. 486. The words "fiduciary capacity" have a broader meaning as used in the present bankrupt act than in the act of 1841. *Ostell v. Brough*, 24 How. Pr. 274; *Sutton v. De Camp*, 4 Abb. (N. S.), 483; *Clark v. Pinkney*, 50 Barb. 226; *Duguid v. Edwards*, 50 id. 288; *German Bank v. Edwards*, 53 N. Y. 541. Where there is a fraud in fact, or where the property has been misapplied by the person while acting in a fiduciary capacity, the debt or obligation is not released by a discharge in bankruptcy. *Stoll v. King*, 8 How. Pr. 298; 1 Wait's Pr. 619.

CHURCH, C. J. This is an appeal from an order refusing to vacate an order of arrest. The action is for converting twenty-nine railroad bonds of \$1,000 each, delivered by the plaintiffs to the defendant Clews, as collateral security for a letter of credit by the latter to the former upon a banking-house in London. There is a conflict in the affidavits. The defendant states that it was agreed, that he might, if he desired, hypothecate the bonds, but for the purposes of this appeal we shall assume that he held the bonds as pledgee, with no other rights in respect to them, than such as that relation entitled him to, and that the hypothecation or sale was wrongful, and entitled the plaintiffs to an action for conversion. The important question is whether the subsequent discharge of the defendant as a bankrupt released him from the liability therefor. This depends upon the construction of § 5117, U. S. R. S., which reads as follows: "No debt created by the fraud or embezzlemen' of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

The question is whether this debt has been created by fraud, or while acting in any fiduciary character within the meaning of this statute. It is not alleged that there were any false representations or deceit, nor any device or trick made or practiced by the defendant to induce the plaintiffs to deliver the bonds, or enter into the arrangement. It was an ordinary commercial transaction, entered into as far as appears in good faith, and the only fraud proved or alleged is such only as may be implied, by the violation of the duty

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resting upon the defendant, under the contract. We think that the term "fraud" used in this statute, means something more than this. It is used in connection with the word "embezzlement" and imports an intentional and affirmative fraudulent act. It must be an active express fraud, and not one implied from an unjustifiable or illegal act.

The recent case of *Neal v. Clark*, 95 U. S. 704, is in principle decisive upon this point. The court held that the "section means positive fraud, or fraud in fact, involving moral turpitude, or intentional wrong as does embezzlement, and not implied fraud or fraud in law which may exist without the imputation of bad faith or immorality."

It cannot be said in this case that the debt was created by fraud, in the sense contemplated by the bankrupt act. Nor do we think it was created "while acting in any fiduciary character." Upon the construction of these words there is some conflict of authority. In nearly all the cases the question has arisen in respect to factors, brokers, and agents. *In re Kimball*, 6 Blatchf. 292, NELSON, J., refused to discharge the bankrupt from arrest for a debt incurred as a commission merchant for failing to remit the proceeds of flour consigned to him for sale. The arrest was made pending the proceedings in bankruptcy, and the learned judge said: "I concur the more readily as the decision of the question by the District Court extends in its operation and effect only to the matter of arrest, and does not affect the question ultimately to be determined." There are some other authorities to the same effect, but the decided preponderance of judicial opinion is adverse to this construction.

In *Chapman v. Forsyth*, 2 How. 202, the court held that a factor who received the money of his principal was not a fiduciary, within the meaning of the bankrupt act of 1841. The language of that act excepted from the operation of the discharge, debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." McLEAN, J., in delivering the opinion, said: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. * * In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial

sense, a disregard of a trust. * * The act speaks of technical trusts, and not one which the law implies from the contract."

It is claimed that the Bankrupt Act of 1867, by omitting the particular trusts specified in the act of 1841, and inserting only the general words "any fiduciary character," is more comprehensive than the act of 1841. But I think a more reasonable inference is that the Supreme Court of the United States, having determined that these general words meant only trusts of the character specified in the act of 1841, Congress deemed it necessary to insert them. The decision of the highest Federal court is authoritative upon questions of Federal cognizance, and this decision should therefore be regarded as controlling. This view was taken by the Supreme Court of Massachusetts in *Cronan v. Cotting*, 104 Mass. 245; s. c., 6 Am. Rep. 232, and in several Circuit and District Courts of the United States. *Grover v. Clinton*, 8 Nat. Bank. Reg. 312; *Oosley v. Colby*, 15 id. 489; *Keime v. Graf*, 5 Rep. 489; *In re Smith*, 18 Nat. Bank. Reg. 24. It is argued that these cases apply to consignments of property to factors, and property intrusted to agents with authority to sell, and that they are therefore distinguishable from the case at bar, but it seems to us that if there is any difference, it is in favor of those cases, because a greater confidence and trust was reposed in them, than in this. Here the relation rested entirely in contract. The defendant held the property as collateral security with the legal right in a certain contingency to sell it, and apply the proceeds upon his demand, and if the contingency did not arise, he was under legal obligation to return it to the plaintiff. If he violated that obligation he is liable for conversion of the property, and in a general sense he violated a trust, but not in that particular and technical sense which the Bankrupt Act contemplates.

Trust and confidence are reposed in nearly all commercial transactions, and the precepts of strict business integrity regard every debtor as a *quasi* trustee for his creditors, but the bankrupt act would have a very limited operation if the language of this section embraced cases of such general fiduciary incidents.

In *Cronan v. Cotting*, *supra*, the court suggests that the phrase implies a fiduciary relation existing previously or independently of the particular transaction from which the debt arises, and the words "while acting" are referred to in support of the suggestion. Confirmatory also of this view are the provisions of the bankrupt law

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which absolutely discharge debts for the conversion of personal property. U. S. R. S., §§ 5067, 5119.

It may be affirmed that in most, if not all cases of conversion, some element of fraud or breach of duty exists in a greater or less degree, and if all such cases were intended to be excepted from the operation of the discharge, the provisions referred to would have no force.

The question will doubtless be regarded as an open one until definitely settled by the Supreme Court of the United States, but we are of opinion that the debt, for which the defendant is sued, was discharged by the Bankrupt Act, and that he was not liable to arrest.

The order of the General and Special Terms of the Superior Court must be reversed, and the motion to vacate granted.

Reversed.

All concur.

Ordered accordingly.

NOTE BY THE REPORTER. To the same effect is *Curtis v. Waring*, Pennsylvania Supreme Court, January 5th, 1880. The court there say:

"The oil was consigned to Waring Bros. & Co. as factors, and they had a special property in it — a lien on it for their commissions, charges and advances; and this, notwithstanding the oil was not to be sold until a time, to be named by the consignors. Under the Bankrupt Act of 1841, a factor who received and retained the money of his principal, was not a fiduciary debtor. That act intended technical trusts, and not those which the law implies from the contract. *Chapman v. Forsyth*, 2 How. 202. For reasons by WELLS, J., in *Gronan v. Cotting*, 104 Mass. 245; s. c., 6 Am. Rep. 232, we adopt the conclusion that the phrase "while acting in any fiduciary character," in the act of 1867, must have the construction which the Supreme Court of the United States had put on the similar clause in the Bankrupt Act of 1841. In *Neal v. Clark*, 5 Otto, 704, where it was held by the State court that Neal was not chargeable with actual fraud, but had committed constructive fraud, which implicated him in the *devastavit*, the Supreme Court of the United States ruled: 'That the term "fraud," as used in § 5117 of the Rev. Stat.; § 33 of the Bankrupt Act of 1867, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without imputation of bad faith or immorality.'

"Whatever view may be taken of the act of him who actually converted the plaintiffs' oil, in absence of affirmative evidence that his partner, R. S. Waring, in fact participated in the sale, or knowingly appropriated its proceeds, the court was right in holding that he was not guilty of positive fraud, involving moral turpitude or intentional wrong, and though fraud was implied against him because of the partnership relation, yet the action was barred by the composition in bankruptcy."

In *Keime v. Graff*, U. S. Circuit Court, W. D. Penn., March, 1878, McKENNAN, J., said:

"The question reserved in this case involves the meaning of the 33d section of the bankrupt law, which enacts that 'no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy.'

"The defendants were produce dealers and commission merchants in the city of Pittsburgh. The plaintiff consigned to them a quantity of cheese for sale, which they sold and rendered an account of the proceeds, and authorized the plaintiff to draw on them

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therefor. A draft was accordingly drawn on them which was taken up by the plaintiff at their request, at maturity. Another draft was then made with a further extension of credit, and this the defendants failed to pay. They then went into bankruptcy, prepared a composition with their creditors, which was accepted by the requisite number of them, the plaintiff dissenting, and was duly approved by the bankruptcy court—and carried into effect by the bankrupts. The plaintiff refused to receive the amount apportioned to his claim, and brought this suit to recover his original debt.

"The act of Congress of June 22, 1874, in its 17th section 'adds' to the Bankrupt Act provisions for composition. The effect of a composition is thus defined: 'The provisions of a composition accepted by such resolution in pursuance to this section shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.'

"Considering that the section, of which this is a part, was enacted since the Bankrupt Act, and is, in terms, an 'addition' to it, that it provides a new and complete method of relief from indebtedness not within the scope of the original act, and that it supersedes the necessity of a formal discharge, which is essential to the release of the debtor under the proceedings prescribed by the Bankrupt Act, the argument, that it is not restricted in its effect to the classes of debts only upon which a discharge in the ordinary proceedings in bankruptcy operates, is, to say the least of it, impressive. The binding effect of an accepted and recorded composition upon creditors is not made dependent upon the nature of their claims, as that of a discharge under the original act is. The only condition of such effect is that the creditor's name and address, and the amount of the debt due him shall appear in the statement, which the bankrupt is required to produce at the meeting at which the resolution of composition is passed. All creditors so named are expressly declared to be bound by it, and only the right of those not named are excepted from its operation. While, therefore, I am strongly inclined to the opinion that the effect of a composition upon the rights of creditors is not qualified by the limitations to which a discharge under the Bankrupt Act is subject. I do not propose to decide the question now. I prefer to assume, for the purposes of this case only, that both are alike operative upon the rights of creditors.

"Would the plaintiff's claim then be released by the defendants' discharge in bankruptcy? The decisions of the courts on this question are not in harmony. *In re Kimball*, 2 Bank. Reg. 204, the District Court for the southern district of New York held that the liability of a factor to his principal was excluded from the operation of a discharge in bankruptcy. This decision was hesitatingly concurred in by Mr. Justice NELSON, 6 Blatchf. 292, and has been followed in a number of cases in that court, and in other courts, State and Federal. The reasons assigned for it are: That the debt of a factor is created by his defalcation, 'while acting in a fiduciary character,' and is thus within the express terms of the act; and that the restricted definition in *Chapman v. Forsyth*, 2 How. 202, of a similar clause in the act of 1841, does not control the phraseology of the act of 1867, because of the partial omission from it of certain classes of trusts which are enumerated in the act of 1841, and are alleged to have limited the comprehensiveness of its terms.

"If the specific enumeration of certain classes of trusts was the only reason, which it was not, assigned by the court for its restricted construction of the act of 1841, I do not think the mere concise phraseology of the act of 1867 is a sufficient warrant for enlarging its scope. The rule of construction which it applied was, that the meaning of words in a charge may be ascertained by reference to the connection in which they are used, and that therefore the import of the phrase 'any other fiduciary capacity,' in the act of 1841, is determined by its association with the preceding words in the same section. The court said: 'The cases enumerated,' 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special trusts, and 'the other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act.'" In *Neal v. Clark*, a case lately decided by the Supreme Court, 5 Otto, 704, Mr. Justice HARLAN delivering the opinion, *Chapman v. Forsyth* is referred to with approval, and the rule *copulatio verborum indicat acceptationem in eodem sensu* there sanctioned, is applied to the construction of the corresponding clause in the act of

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1867. The court say: 'Applying these rules to this case, we remark that in the section of the law of 1867, which sets forth the class of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. * * A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system.'

"Now the default of a factor in not making payment to his principal is not a fraud within the meaning of the thirty-third section of the act of 1867, as is shown by *Neal v. Clark*, *supra*. Nor is the debt of a factor created by this defalcation 'while acting in any fiduciary character,' as the meaning of this phrase is expanded in *Chapman v. Forsyth*, *supra*, unless the phraseology of the act of 1867 has changed the sense of this phrase as it stood in the act of 1841. The main portions of the two sections are in the same words in both acts; and the mere verbal differences between them do not seem to me to change their substantial import. Such was the view entertained, and very impressively enforced by the Supreme Court of Massachusetts in *Cronan v. Cotting*, 104 Mass. 245; s. c., 6 Am. Rep. 232, and by the Circuit Court of the United States for the Western District of Wisconsin, in *Grover v. Clinton*, 8 Bank. Reg. 314, Mr. Justice Davis concurring in the opinion. If this view is correct, as I think it is, then *Chapman v. Forsyth* conclusively determines the meaning of the act of 1867, and excludes from the operation of the exception the debt sued for here.

"It is evident that the thirty-third section of the act of 1867 was framed upon the model of the corresponding section of the act of 1841. They are *ejusdem verbi*, except that the words 'or as executor, administrator, guardian or trustee,' immediately following the phrase 'defalcation as a public officer,' in the act of 1841, are omitted in the act of 1867; and fiduciary 'character' is substituted in the latter for fiduciary 'capacity' in the former.

"The act of 1867 must then be read, no debt created by the 'defalcation' of the bankrupt 'as a public officer,' or by his defalcation 'while acting in any fiduciary character, shall be discharged.' So, applying the rule *noctitur a sociis* to the interpretation of this language, its meaning is clearly the same as that employed in the act of 1841. The general words 'or while acting in any fiduciary character,' are directly associated with the specific terms 'defalcation as a public officer,' and must therefore be construed as qualifying each other, and referring to the same class of trusts. Moreover the term 'defalcation,' which must be read in connection with the phrase in question, to make it intelligible, imports a greater degree of culpability than that which attaches to a refusal or failure to pay a debt, even though it is attended by a breach of confidence. It involves 'moral turpitude or intentional wrong,' hence it is associated with liabilities of like moral character and imports a classification of kindred subjects.

"I am therefore of opinion: '1. That the debt in suit was not created by the fraud of the defendants, as that term is defined in *Neal v. Clark*.

"2. That the thirty-third section of the Bankrupt Law is substantially the same with its kindred section in the act of 1841, and that its scope and meaning are therefore authoritatively determined by the decision of the Supreme Court in *Chapman v. Forsyth*.

"3. That adopting the rules of construction applied in both of the cases referred to, only technical or special trusts as contradistinguished from those which the law implies from the contract are within the meaning of the thirty-third section of the Bankrupt Act.

"4. That the debt in question is not included in any of the classes of excepted indebtedness, and would be barred by a discharge, and is therefore equally within the protection of the composition pleaded.

"5. That the defendants are entitled to judgment *non obstante veredicto*, which is accordingly ordered to be entered."

See *Desobry v. Tête*, *ante*, p. 233.

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(77 N. Y. 472.)

Contract — entire — action on.

Plaintiff agreed to furnish and erect on defendant's premises a gas generator "all ready to make gas," the defendant agreeing to pay freight, furnish tank and house, and pay \$1,500 for the machine, "\$500 when the works are on the ground," and the balance in two subsequent specified installments. The plaintiff shipped the materials, which the defendant received and paid the freight on, but the defendant refused to permit him to erect the machine. *Held*, that the contract was entire and indivisible, and an action for the contract price was not maintainable.

ACTION on contract. The opinion states the case. The plaintiff had judgment below.

George W. Miller, for appellant.

Samuel Hand, for respondent.

DANFORTH, J. The plaintiff submitted a proposition in writing to the defendant and it was in like manner accepted. By it the plaintiff said: "I propose to furnish you, for your hotel in Luzerne, N. Y., one of Butler's Gas Generators and Holders. * * * The holder to be of sufficient capacity to contain fifteen hundred cubic feet of gas. To furnish all pipes to connect the generator with the holder, and the holder with the main pipe leading to the hotel; all weights and chains, sheaves and pulleys to support and balance the holder. All labor for putting up and setting the retorts, and hanging the holder, and connecting the pipes as before mentioned, and a sufficient air mixing meter, for the sum of \$1,500. You (the defendant) are to furnish the tank and house for holder and generator and gallows frame for support of holder, to pay the freight on the machine from New York, and board one mechanic while putting up and connecting as above, exclusive of the cost of the machine, and furnish one man to help rivet the gas-meter. I guarantee * * * that the machine shall be put up in the best and most workmanlike manner, and all ready to make gas by June 7th, if your part of the work does not delay us. Payments to be \$500 cash when the works are on the ground, \$500 in one bond,

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due September 25, 1872, and \$500 in one bond, due September 25, 1873, with interest."

The plaintiff in his complaint alleges that he "delivered the gas works to the defendant at Luzerne in accordance with the contract;" avers a constant readiness on his part "to set the same up and make the connections in accordance with the agreement" but says "the defendant has never permitted him to do so," and for breach, that the defendant, "except to pay freight charges on said gas works, has wholly failed to perform the agreement on his part and has not paid the sum of \$1,500, and for that sum, with interest, he demands judgment."

Upon the trial the referee found in accordance with the complaint, and among other things, "that the plaintiff delivered the gas works to the defendant at Luzerne; that the extra expense which the plaintiff would have incurred to set the same up and make the connections is one hundred dollars," and deducting that from the contract price, finds that the plaintiff is entitled to recover the balance, and directs judgment therefor with interest from the 1st of July, 1871. The defendant excepted to these findings, and the exceptions, I think, are well taken. The contract is single and entire. If performed by the plaintiff he would be entitled to recover the full sum of \$1,500, part in cash, part in bonds. He was not to furnish materials and perform labor upon them for the defendant, but from his own materials and by his own labor furnish to the defendant, properly affixed to his premises, a completed machine of a particular kind "all ready to make gas."

It is not pretended that this has been done; on the contrary, the defendant has not permitted him to do it,—and as the contract price is not divisible, there is no ground on which a recovery can be had for any part of it. *Inchbald v. Western, etc.*, 17 C. B. (N. S.) 733; *Blanch v. Cocheran*, 8 Bing. 14. Nor is it in any sense true that the gas works have been delivered to the defendant. Certain materials, among others, sheet and other kinds of iron, in bundles and rolls; castings, grates, rings, retort covers, and "one machine bottom," which, when properly arranged and joined together, may compose a machine; were delivered by the plaintiff to a common carrier, who received them at "owner's risk." They were marked B. C. B., or B. C. B. for B. C. Butler, Luzerne, N. Y., and the defendant paid the freight upon them. Even these things did not thereby become his property;

the freight was paid in execution of the contract, but the goods remained the goods of the plaintiff. If lost during transportation, or if destroyed after reaching the place of destination, the plaintiff would have to bear the loss. He could change their destination and make such use of them as he saw fit. His creditors could take them in execution (*Atkinson v. Bell*, 8 B. & C. 277), for the defendant was to have, not these articles as separate parts or members from which by the application of skill and labor a machine could be constructed, but a complete thing, placed upon his own premises, of the required capacity and ready for use; and until that was furnished the property in these chattels did not pass from the plaintiff. *Atkinson v. Bell*, 8 B. & C. 277; *Johnson v. Hunt*, 11 Wend. 137; *Tripp v. Armitage*, 4 M. & W. 698; *Andrew v. Dieterich*, 14 Wend. 35; *Andrews v. Durant*, 11 N. Y. 35; *Ward v. Shaw*, 7 Wend. 404; *Decker v. Furniss*, 14 N. Y. 611; *Clark v. Balmer*, 11 M. & W. 243. Doubtless the plaintiff may in this, as in other cases where the performance of a contract has been prevented by the act or omission of the other party, recover what he has lost thereby, if any thing, or the damages sustained, if any. *Hosmer v. Wilson*, 7 Mich. 294. Such a case, however, was not presented to the referee, nor was it suggested by the pleadings. The plaintiff neither claimed nor proved damages arising from the breach of the contract, nor from being prevented from performing it. On the contrary, the cause of action was treated by the plaintiff and referee and by the court below as one where property bargained for had been delivered and title vested in the purchaser, and for which, therefore, the plaintiff, within well-settled rules of law, might maintain the action and recover the purchase-price. And such is the contention of the learned counsel for the respondent upon this appeal. There is, however, nothing in the evidence to warrant that view of the case, or permit the application of such rule of law.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

· All concur.

Prentice v. Knickerbocker Life Insurance Company.

PRENTICE V. KNICKERBOCKER LIFE INSURANCE COMPANY.

(77 N. Y. 488.)

Insurance — condition for payment of premiums — waiver.

A policy of life insurance, assigned to plaintiff, provided that the defendant should be notified forthwith of the death of the insured, and that the owner should, as soon as possible thereafter, deliver to the defendant a particular account of the cause, time, place and circumstances, and that unless such proofs were presented within twelve months from the time the death occurred, the policy should be forfeited. After the assignment the plaintiff paid the premiums by his checks. About July 1, 1872, the plaintiff, being about to go to Europe, paid in advance the premium due August 10. It was then agreed between him and the general agent that if the insured should die before the premium became due the company's agents would know of it before the plaintiff could, and that the premium should be returned, and that "there was no trouble at all in regard to that whole thing." The plaintiff returned in October, 1872. The insured died July 27, 1873, but his death was not known to either party until July, 1875. The plaintiff paid the premiums for 1873 and 1874, having received notice from the company of the time when they were to fall due, and receiving renewal receipts. In June or July, 1875, plaintiff learned of the death, notified the company, received blanks for proofs of death, and delivered the proofs to them July 9. The proof stated the death in July, 1873. The company retained the proofs until October next without objection, and then took the ground that the policy was forfeited by the omission to serve the proofs within twelve months of the death. The policy was payable in three months after proof of death. The company retained the premiums paid after the death, and never offered to return them until after the action. *Held*, that the forfeiture was waived.

ACTION on life policy. The opinion states the facts. The plaintiff had judgment below.

Henry W. Johnson, for appellant. Plaintiff was obliged to comply with the conditions of the policy, unless performance was excused or waived. *Bliss on Life Ins.* (2d ed.) 600; *May on Ins.* 583; *Riddlesbarger v. Hart. Ins. Co.*, 7 Wall. 386; *Roach v. N. Y. and Erie Ins. Co.*, 30 N. Y. 546; *Ripley v. Aetna Ins. Co.*, id. 136; *Ames v. N. Y. Un. Ins. Co.*, 4 Kern. 255; *Gamble v. Accident Ass. Co.*, 4 Ir. R. 204; *Smith v. Conn. Mut. Life Ins. Co.*, 4 Big. 421; *Schumacher v. Manhattan Life Ins. Co.*, 3 Ins. L. J. 455; *O'Reilly*

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v. *Guard. Mut. L. I. Co.*, 60 N. Y. 169, 173, 174; s. c., 19 Am. Rep. 151. The renewal receipts given by defendant could not operate to continue the policy in force. *Simpson v. Acc. Death I. Co.*, 2 C. B. (N. S) 257; *La Favour v. Ins. Co.*, 1 Phila. 558; s. c., 2 Big. 158; *Ins. Co. v. Wolff*, 5 Otto, 331, 333.

Wm. P. Prentice, for respondent.

ANDREWS, J. The facts in this case are peculiar. The action is upon an endowment policy issued by the defendant, August 10th, 1867, to and upon the life of one Edwin W. Mitchell, whereby the defendant, in consideration of the payment by the assured, during the life of the policy, of the annual sum of \$337.40, insured him in the sum of \$5,000, payable February 11th, 1883,—or in case of his death prior to that date, then within three months after due notice and satisfactory proof of his death. The sixth condition of the policy provides that the company shall be notified forthwith of the death of the insured, and that the owner of the policy shall, as soon as possible thereafter, deliver to the company as particular an account of the cause, time and place of death, and the circumstances attending the same, as the nature of the case will admit; and the ninth condition provides that “full proofs shall be presented within twelve months from the time the loss occurs, or the claim will be forfeited.” The insured, by a written assignment, dated December 9th, 1867, assigned the policy to the plaintiff. The company, on the same day, was notified of the assignment, and by an indorsement thereon, signed by its president and secretary, approved the same and waived proof of interest in the plaintiff. The insured and the plaintiff, at the time the policy was issued and the assignment made, resided in Brooklyn. Mitchell was employed as a clerk in the post-office in the city of New York. The plaintiff after the assignment paid the premiums on the policy by his checks payable to the order of the company. About the 1st of July, 1872, the plaintiff, being about to leave the country on a visit to Europe, paid to the general agent of the defendant in advance the premium on the policy in question, which would become due August 10th, 1872, and on other policies held by him issued by the defendant. In the interview between the plaintiff and the general agent on this occasion the question was raised by the plaintiff as to the position of the parties in case the prepayment was

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made and the insured should die before the premium became due. The agent replied that the company had agents who would know of the death before he could, and that in any case, if he advanced the money, it would be returned, "and that there was no trouble at all in regard to that whole thing." The plaintiff returned from Europe in October, 1872. The insured died at Montclair, New Jersey, July 27, 1873. But his death did not become known either to the plaintiff or the defendant until about July, 1875. The plaintiff paid to the defendant the premiums for the years 1873 and 1874, on the supposition that the insured was still living. In both years, before the payment was made, the defendant gave written notice to the plaintiff of the day the premium would fall due, and on receiving the premium executed the usual renewal receipt. In the latter part of June or early in July, 1875, the plaintiff was informed of Mitchell's death. He immediately notified the company of the fact and upon his application was furnished by the company with blanks to enable him to prepare proofs of loss, and they were prepared and delivered to the company July 9, 1875. The proofs were full and complete and informed the company of the death of Mitchell in July, 1873. The company retained the proofs of loss and it was not until sometime in October, nearly or quite three months after they were served, that any objection was made to the allowance of the claim, and then for the first time the company took the position that the claim was forfeited for the reason that proofs were not served within twelve months after the death of the insured. It retained the money paid for premiums by the plaintiff after the death of Mitchell, and made, so far as appears, no offer to return them until after the commencement of this action. The defendant defends upon the sole ground that the claim on the policy was forfeited by failure of the plaintiff to furnish proofs within twelve months after the death of Mitchell. The answer sets up neither fraud nor breach of warranty, and expressly admits that the insured died from natural causes, and that his death was not occasioned by any of the causes excepted in the policy. There is no hint in the pleadings or evidence of any defense to the claim upon the merits. The defendant has the right, however, to stand upon the letter of the contract, and as it is undisputed that the proofs were not furnished within twelve months of the death, the claim, in the language of the condition, "is forfeited," unless the defendant has waived the default or otherwise

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precluded itself from taking advantage of the condition. We are of opinion that the circumstances justify the inference of a waiver by the defendant. It is plain that the defendant was not bound to take advantage of the forfeiture. The object of the provision in question is manifest. The policy provides that the company shall not be liable for death happening under certain circumstances, and it requires the claimant to furnish a particular statement of the time, manner and circumstances of the death, and it limits the time for doing this that the company may have a reasonable opportunity to investigate the truth of the statement. In this case the omission to comply with the condition as to time was the result of mistake. There can be no pretense that the defendant had any just ground for insisting upon the forfeiture beyond that based upon the letter of the contract. The general agent assured the plaintiff in July, 1872, that the company's agents would know of the death of the insured before he would. The company had received the plaintiff's money for premiums for two years after the death of Mitchell and both parties supposed that during that time the policy was in force. When the fact that Mitchell had died in 1873 was ascertained the plaintiff acted with promptness and served his proofs on the defendant. Common fairness required that the company, if it intended to rely upon the technical defense now insisted upon, should then take its ground. It would not have changed the position of the plaintiff, but the question here is, did the defendant, by its silence, in connection with the other circumstances, justify the inference that it accepted the proofs as a compliance with the policy. It retained the premiums paid in 1873 and 1874, and did not offer to return them. It is quite probable that the company could not under any circumstances refuse to return this money, but it is inconsistent with honesty and fair dealing that the company should hold this money, apparently claiming it, and yet intend to deprive the plaintiff of the benefit of the policy. We are of opinion that the natural and reasonable presumption is that the company retained the proofs because it elected to waive a technical defense, and thereby concluded itself from insisting upon the forfeiture. The circumstances presented a case wherein such an election was eminently just, and the company may have regarded the assurances of its general agent, made to the plaintiff in 1872, as calculated although not designed to mislead him and put him off his guard. It is now understood to be the doctrine of this court that no new

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consideration is required to support a waiver by an insurance company of a condition in respect to the time of serving proofs of loss, and that it may be done by acts or conduct occurring subsequent to the breach of the condition, indicating an intention to waive such condition, although there is no new consideration, and although there may be no technical estoppel. *Goodwin v. Massachusetts Mutual Life Ins. Co.*, 73 N. Y. 480, and cases cited.

Judgment affirmed.

All concur.

STEINBACH V. RELIEF FIRE INSURANCE COMPANY.

(77 N. Y. 498.)

Judgment—former—when bar to action to reform insurance policy.

The defendant, a New York corporation, insured the plaintiff at Baltimore, Maryland, against fire, on "his stock of fancy goods, toys, and other articles in his line of business, contained in his store occupied by him as a general jobber and importer." The policy contained a condition against storing or keeping hazardous, extra hazardous, or specially hazardous articles in the second class of hazards annexed to the policy, and that during the time of such storing or keeping the policy should be of no effect. "Fire-crackers in packages" were classed as hazardous No. 2 in the second class, and fire-works were classed as specially hazardous. There was a written permission "to keep fire-crackers on sale," but no express permission to keep fire-works. The plaintiff kept fire-works and the fire originated from them. The plaintiff sued to recover for the loss in a Baltimore court, the cause was removed to the United States court, and on the trial the court held that the policy prohibited keeping fire-works, and rejected proof to show that they constituted an article in the line of business of a "German jobber and importer," and gave judgment for defendant. This was affirmed by the United States Supreme Court. Before that action the plaintiff had sued the Lafayette Fire Insurance Company in the New York Supreme Court on a similar policy on the same stock and had recovered, and on appeal the evidence rejected in the United States court was held competent, and the appellate courts refused to be bound by the rule laid down in the United States Supreme Court. Plaintiff then brought this action to reform the policy by inserting permission to keep fire-works, on the ground that it was omitted by mistake, and to recover on the policy so reformed. *Held*, that the judgment of the United States Supreme Court is a bar to this action.

ACTION to reform and recover on a fire policy. The opinion states the facts. The defendant had judgment below.

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A. R. Dyett, for appellant. The fact that plaintiff had brought an action upon the policy as it is, and was defeated, is no reason why the policy should not be reformed. *Sanger v. Wood*, 3 Johns. Ch. 416, 422; *Cheesman v. Sturges*, 6 Bosw. 520, 522, 528; 9 id. 246. 255, 256; *Gardner v. Ogden*, 22 N. Y. 327; *Gump's Appeal*, 65 Penn. St. 476; 3 Bl. Com. 429; 19 Conn. 548, 553; 7 Geo. 64, 70; *Harris v. Jex*, 66 Barb. 632; 55 N. Y. 421; *Harney v. Charles*, 45 Mo. 157; *Birckhead v. Brown*, 5 Sandf. 134.

John L. Hill, for respondent.

EARL, J. In October, 1865, the defendant, a New York corporation, issued to the plaintiff at Baltimore, Maryland, a policy of insurance against fire on his "stock of fancy goods, toys and other articles in his line of business, contained in his store, occupied by him as a German jobber and importer." The policy contained a provision that if the assured should use the premises "for the storing or keeping therein articles, goods or merchandise hazardous, or extra hazardous, or specially hazardous, in the second class of hazards annexed to the policy," during the time of such use the policy should be of no effect. The article "fire-crackers in packages" was classed as hazardous No. 2 in the second class, and fire-works were classed as specially hazardous in the same class. The policy contained written permission "to keep fire-crackers on sale," but no express permission to keep fire-works. At the time of the insurance, and afterward, the plaintiff kept fire-works in his store; and during the life of the policy a fire occurred, originating in the fire-works, and the loss was occasioned which is the subject of this action.

In February, 1869, the plaintiff commenced an action against the defendant, to recover upon the policy for such loss, in the Superior Court of the city of Baltimore. The defendant appeared in that action and procured the removal thereof to the Circuit Court of the United States. The action was subsequently tried in the latter court, the defense being that the keeping of fire-works was a breach of the policy. The court held that the terms of the policy prohibited the keeping of fire-works, and rejected proof offered by the plaintiff to show that fire-works constituted an article in the line of business of a "German jobber and importer," and judgment was given for the defendant. The plaintiff then took the case, by writ of error, to the Supreme Court of the United States, and there the judgment was affirmed.

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Before that action was commenced in Baltimore, the plaintiff had sued the La Fayette Fire Insurance Company, in the Supreme Court of this State, upon a similar policy upon the same stock of goods, and had recovered. From the judgment in that case there was an appeal to the General Term, and then to the Court of Appeals, and in those courts the proof rejected in the United States Court was held competent. *Steinbach v. La Fayette Fire Ins. Co.*, 54 N. Y. 90. The commission of appeals, with the decision of the Supreme Court of the United States in the case there decided before it, refused to follow or be bound by the same; and thus the highest courts of the State and of the nation were in conflict.

Now the plaintiff has commenced this action to reform the policy by inserting therein permission to keep fire-works, on the ground that such permission was omitted from the policy by mistake, and to recover upon the policy as thus reformed. He has thus far been defeated, on the ground that the judgment in the United States Court is a bar to the maintenance of this action, and whether it is or not is the sole question for our determination.

Whatever was necessarily determined in that action concludes the parties, and can never again be brought into litigation between them, so long as the judgment therein remains in force. That is the universal rule always applied, no matter how much injustice may be done in a particular case. Such a rule of law, which generally tends to justice, cannot be changed to meet the exigencies of a case where a different rule would work out juster results.

In order to bring a case within the rule, the second suit must be founded substantially upon the same cause of action as the first; and the test of that is that the same evidence will support both actions; and the rule is the same, although the two actions are different in form. *Gregory v. Burrall*, 2 Edw. Ch. 417; *Rice v. King*, 7 Johns. 20; *Johnson v. Smith*, 8 id. 383. And it matters not that the former action was decided upon erroneous grounds. *Morgan v. Plumb*, 9 Wend. 287.

Here there was but one contract of insurance, and the cause of action in Baltimore suit, as in this, was founded on that. In that suit the plaintiff sought to recover by proving that he was permitted to keep fire-works. By the same proof he seeks to recover in this. There he sought to prove the permission by parol. Here he seeks preliminarily to have the writing reformed, so that he can prove it

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by the writing. If he could succeed here, he would in some form have to prove precisely what he offered to prove there, to wit, that he was permitted to keep fire-works. If the plaintiff could succeed in reforming this contract, it would not change its scope or effect. It would, according to the decisions in this State, be the same contract still. The only change would be that the plaintiff would have direct written proof of what, without such reformation, would rest upon construction, and inference based upon other provisions in the contract, and upon parol evidence. The contract would then be, in its legal effect, the same as that the plaintiff sought to enforce in the former suit.

It is admitted by the plaintiff that the judgment against him in the former action is a bar to any recovery in this, unless he can change the contract. Now what was determined in that action? Clearly that the contract between the parties was such as was embraced in the policy declared on and proved in that action; and that the plaintiff had violated the policy by keeping the fire-works. Now he seeks to establish, in this action, that that was not the contract, and to have it reformed; and that the real contract between the parties was not violated. He sought, in that action, to recover for his loss, and gave all the proof he could to show that he was entitled to recover. Now, without alleging that there was more than one contract of insurance, or more than one title or right, upon which to base a recovery, he seeks to recover for the same loss. This is a case, it seems to me, where the doctrine of *res adjudicata* must apply, and bar a recovery, unless plain principles of law, which have always been regarded as important in the administration of justice, are disregarded.

According to the case of *Washburn v. Great Western Ins. Co.*, 114 Mass. 175,—in all its essential features like this—the plaintiff, having elected to sue upon the contract as it was, and been defeated, is bound by that election, and cannot now maintain this action to reform the contract.

The judgment must be affirmed, with costs.

Judgment affirmed.

All concur, except CHURCH, C. J., dissenting.

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PEOPLE EX REL. KELLY V. COMMON COUNCIL OF BROOKLYN.

(77 N. Y. 508.)

Office — public — vacancy in — representative in Congress.

The charter of the city of Brooklyn prohibits every alderman from holding "any other public office," and provides that by election to and acceptance of "such public office," "his office as such alderman shall immediately become vacant," and a special election shall be held to fill the vacancy. An alderman was elected representative to Congress, and accepted the office. *Held*, that his office as alderman immediately became vacant; no judicial proceeding was necessary to determine his title; and it was the duty of the defendant to order a special election to fill the vacancy.

A PPEAL from order for peremptory mandamus, requiring defendant to hold a special election to fill a vacancy in the office of alderman, created by the incumbent's election to and acceptance of the office of representative in Congress. The opinion states the facts.

William C. De Witt, for appellant. A representative in the Congress of the United States is not a public officer. Bayard, Cong. Globe 36, Jan. 19, 1864, app.; 1 R. S. (6th ed.) 88, § 8; *Impeachment of Blount*, Am. Cong. 5 Cong. 1777-1779, vol. 2, 203, 108. The question of O'Reilly's title to the office cannot be determined except by direct judicial proceedings, to which he is a party. *Foot v. Stiles*, 57 N. Y. 399. A mandamus will not lie. Dill. on Mun. Corp., §§ 680, 714; *People v. Mayor*, 3 Johns. Cas. 79, *People v. Stevens*, 5 Hill, 616; *People v. Stevens*, 2 Abb. Pr. (N. S.) 348; *People ex rel. Dolan v. Lane*, 55 N. Y. 217; *Frost v. Mayor*, 5 Ell. & B. 530; *Queen v. Plaffer & Ricketts*, 7 Ad. & El. 966; *Mayor v. Romauter*, 47 Wis. 547. If this court has jurisdiction, the only remedy is by *quo warranto*. Dill. on Munic. Corp., § 714. It is the only remedy by which a title to office can be tried. *Mayor v. Conover*, 5 Abb. Pr. 252. It is the remedy prescribed by statute. 2d ed. Stat. at Large, 602; *Lewis v. Oliver*, 4 Abb. Pr. 121. This court has no jurisdiction. *In re Kalbfleisch*, 62 N. Y. 457; *People v. Metzger*, 47 Cal. 524. The thirty days allowed by the charter for calling a special election not having expired when the order of the Special Term was made, no mandamus could then have been had. Law 1873, 1297, § 5.

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Roger A. Pryor, for respondent.

DANFORTH, J. On the 26th day of March, 1869, the relator, upon affidavit, applied to the Special Term of the Supreme Court for an order that the common council of the city of Brooklyn show cause why they should not be required to call an election to fill a vacancy existing, as was alleged, in the office of alderman from the twelfth ward. He stated that he was a resident and elector in that ward, and set out so much of the charter of the city as provides that "no alderman shall during the term for which he is elected hold any other public office except that of notary public or commissioner of deeds," and declares that "if any alderman elected" under its provisions "shall be appointed or elected to and accepts such public office * * * after his election or during his term of office as such alderman, his office as alderman shall immediately become vacant and his place shall be filled by a special election to be ordered within thirty days thereafter by the common council to be held by electors of the ward in which he shall have been elected," — and states that Daniel O'Reilly was in November, 1877, elected alderman from that ward — that while he was such alderman, and in November, 1878, he was elected representative in Congress for the second congressional district of this State — accepted the office and on the 18th day of March, 1879, entered upon the discharge of his duties — that by reason of this election and acceptance, the office of O'Reilly as alderman immediately became vacant and so continues — that no election to fill the vacancy has been ordered, by the common council, and although notified by the mayor of the city and requested to order an election pursuant to law to fill the vacancy, they refused to do so. The order to show cause was granted, and the common council answered thereto. They do not deny the matters of fact above stated as to O'Reilly and his several elections and acceptance as above stated, but do deny that his office of alderman thereby became vacant, because they say, that although a representative in Congress, he does not thereby hold "another public office." The court at Special Term held otherwise, and made an order that a peremptory writ of mandamus issue commanding the common council forthwith to order a special election to fill the vacancy. That order, having been affirmed by the General Term, has been taken to this court. The case has been presented by the counsel for the appellant with

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unusual ingenuity, but he has not satisfied us that the decision of the court below is wrong.

At the foundation of his argument is the assertion that a "representative in the Congress of the United States is not a public officer." The statement of this proposition would seem to carry its own refutation, but it has been argued with zeal and apparent confidence and is to be considered. He urges in its support that the Constitution of the United States does not class it among the offices of the government of the United States — this may be conceded. He also says that the Constitution of our State does not so regard it, but excludes it from offices, meaning, as I understand the statement, offices of the United States. This also may be conceded, for neither proposition affects the question before us. Admitting that a representative in Congress is not regarded as an officer of the United States, by the instruments referred to, it by no means establishes the assertion that the representative does not hold a public office within the meaning of the charter.

We are to construe its provisions according to the ordinary sense of the words used in *Newell v. People*, 7 N. Y. 97, and giving to them their natural and obvious signification and import, there can be no doubt as to the meaning of each clause in question here. The House of Representatives stands in the place of the whole body of the American people. The scheme of representation being a substitute for a meeting of the citizens in persons — but each member of the house exercises legislative power, although as the defendant claims "the people may be deemed present in making the laws." Mr. O'Reilly has therefore a trust or charge conferred by authority for a public purpose, and by his acceptance has undertaken to perform the duties which the law prescribes for such employment. He holds a public office although his dependence is upon the people. BEST, C. J., in *Henly v. Mayor of Lyme*, 5 Bing. 91, answering the question "what constitutes a public officer," says: "In my opinion every one who is appointed to discharge a public duty and receives a compensation in whatever shape, from the Crown or otherwise, is constituted a public officer." Said SANDFORD, Chancellor, in the *Case of Wood*, 2 Cow. 1, note page 30: The terms "office and public trust have no legal or technical meaning distinct from their ordinary signification. An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested." Within these and

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all other definitions of the same words, when Mr. O'Reilly accepted his place as member of the House of Representatives, he took "office." *People ex rel. Henry v. Nostrand*, 46 N. Y. 375.

But the learned counsel for the appellant contends that the terms of the charter must be confined in their interpretation to those offices which are within the sphere of State cognizance—and that the words "other public office" therein used should be construed "to mean an office within the purview of State legislation." There are certainly no words of exclusion. The language is general and comprehensive, and if not so, does, by necessary implication, bring within its operation the office in question, for such an office is within the mischief to prevent which the statute was passed—and must be deemed to have been in contemplation of the law makers. We may, however, adopt his argument and find the condition complied with in the very language of the statutes of the State—where "the representative in Congress" is styled an "officer," and the position which he holds—an "office." 2 Revised Statutes, part 1, title 2, chapter 6, section 1, defines general elections to be "such as are held at the same time * * * for the election of certain 'officers,' naming among others 'representatives in Congress.'" Section 8 provides for filling at special elections "all vacancies in the office of representative in Congress," etc., and declares that "when the term of service of any such officer will expire at the end of the year during which the vacancy in his 'office' shall occur * * * the usual election shall be held for a new 'officer.'" "The ballot indorsed Congress shall contain the names of the persons designated for the office of representative in Congress" (tit. 4, art. 2, § 14); and the same appellation is used in section 16, speaking of a vacancy "in the office of such representative;" and title 5, article 1, section 7, prescribes a statement to be made of votes given "for the office of governor, * * * representative in Congress," etc.; and by section 21, article 2, the county clerk is to record the certificate of votes for "the office of representative in Congress;" and by section 44, article 5, title 5, "if either of the persons chosen shall have been elected to supply a vacancy in 'the office of representative in Congress,'" etc. Chapter 6, title 6, article 1, treats of the election of members of Congress, and provides for notice to the secretary of State if a vacancy shall occur by death in the "office of representative in Congress," etc.; and the same phraseology is used in the acts of 1842,

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chapter 130, and 1847, chapter 240, relating to elections. It follows then that to Mr. O'Reilly has happened that event which makes his office of alderman "vacant." Such is the plain and emphatic language of the statute, and it is therefore unnecessary to consider, as the learned counsel for the respondent asks us to do, whether the duties of alderman to be performed in the city of Brooklyn can be fairly attended to by one who has been delegated by a larger constituency to render service by personal presence in the city of Washington. The office is vacant by operation of law. It became so "immediately" upon his election to and acceptance of the office of representative. Charter of Brooklyn, above cited; *People ex rel. Whiting v. Carrique*, 2 Hill, 93; *People ex rel. Henry v. Nostrand*, 46 N. Y. 381; *People ex rel. Ryan v. Green*, 58 id. 304.

The defendants claimed, however, in that return that "the right to order a special election depends on the title of said O'Reilly as alderman *de facto* to said office," and that this question is now under consideration by them. They are charged with no such judicial duty, and in assuming it they meddle with functions that do not belong to them. Nor is there any force in the contention of their counsel that the title of O'Reilly to the office "cannot be determined, except by direct judicial proceedings to which he is a party." The moment he accepted the new office the old became vacant. His acceptance of the one was an absolute determination of his right to the other, and left him "no shadow of title, so that neither *quo warranto* nor a motion was necessary." *People ex rel. Whiting v. Carrique*, 2 Hill, 93-97; Dill. on Munic. Corp., § 164, and cases cited, note 1. These cases also show that this would be so at common law and independent of the statute. He was no longer alderman *de facto* or *de jure*. The plea of plenarty, on which the appellant's counsel insists, or that the office was "full of him," and which is also set up in the answer to this proceeding, is in no sense well founded. It cannot be sustained even by a legal fiction. The office was and is as vacant as if Mr. O'Reilly had never been born; his removal is as complete as if caused by death. When he accepted the new office the other ceased to have an incumbent. It was not a case, therefore, for *quo warranto*, for that will lie only when the party proceeded against is either a *de facto* or *de jure* officer in possession of the office (*King v. Corporation of Bedford Level*, 6 East, 368), and an office that is vacant is in possession of no one. Besides, such writ issues when facts are in dispute, and one object aimed at is to

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ascertain the facts ; here no fact is disputed, but a mere question of law.

It was therefore the duty of the defendants to order a special election. As to this the charter is imperative (§ 5, *supra*), and furnished the only rule for their official conduct ; they had no right to question it, or do otherwise than obey. It was their duty also to make the order at such time as would enable the electors of the ward "to fill his place" within thirty days after the vacancy occurred.

Having, as the return concedes, failed in the performance of this duty, and in reply to the order to show cause set up only that the office was not vacant, the writ of mandamus was properly issued. Dill. on Mun. Corp. 674; *Lumb v. Lynd*, 44 Penn. St. 336; *State ex rel. Hanner v. Common Council of Rahway*, 33 N. J. L. R. 110; *Note to Fish v. Weatherwax*, 2 Johns. Cas. 217-221.

[Omitting minor considerations.]

We think no error was committed by the court below, and the order should therefore be affirmed, with costs.

Order affirmed.

All concur.

McDONALD V. MALLORY.

(77 N. Y. 546.)

Action — when maintainable under State statute for negligently causing death on high seas.

Under a statute of New York, giving a right of action for wrongfully or negligently causing the death of any person, an action may be maintained for negligently causing the death of a citizen of New York on the high seas, on a vessel hailing from and registered in a New York port, and employed by the owners at the time in their own business.

ACTION for damages for negligently causing death of plaintiff's intestate. The complaint alleged that defendants owned the steamer "City of Waco," and employed it in trading between the city of New York and Galveston, Texas; that defendants were citizens and residents of the city of New York, and said steamer was registered and belonged in the port of New York; that deceased, a

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citizen and resident of the State of New York, was employed on the steamer as a fireman; that the steamer received on board, at New York, as freight, or to be used as stores on the steamer, 300 cases of crude petroleum, in violation of the laws of the United States; that while the said steamer was lying at anchor on the high seas, outside the bar and harbor of Galveston, she took fire, and by reason of the petroleum the fire could not be extinguished, whereby and by the defendant's culpable negligence plaintiff's intestate came to his death; that "said negligence and death occurred within the territory of the State of New York, to wit, at the city of New York, and on board said steamer belonging to the State of New York, and being at first at the city of New York, and thereafter on the high seas, as above stated." The defendants demurred to the complaint, on the grounds for want of jurisdiction, and that it did not state facts sufficient to constitute a cause of action.

Robert D. Benedict, for appellant.

William Allen Butler, for respondents. The statute under which this action was brought does not give a right of action in this State to recover for injuries committed without the territorial limits of the State, and resulting in death. Laws 1847, ch. 450; Laws 1849, ch. 256; Laws 1870, ch. 78; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; s. c., 3 Bosw. 67; *Crowley v. Panama R. R. Co.*, 30 Barb. 99; *Beach v. Bay St. S. Co.*, id. 433; *Vandeerwerker v. N. Y. and N. H. R. R. Co.*, 27 id. 244; s. c., 6 Abb. Pr. 239; *Mahler v. Trans. Co.*, 35 N. Y. 352, 353; *Kelly v. Crapo*, 55 id. 86; s. c., 6 Am. Rep. 35. This State has never exercised or claimed to exercise jurisdiction beyond its boundaries so as to give an extra territorial effect to a local statute, such as the one in question here. *Kelly v. Crapo*, 45 N. Y. 86; s. c., 6 Am. Rep. 35; *McKeon v. Delancy*, 5 Cr. 22; *Suydam v. Williamson*, 24 How. 427. The shipment of the petroleum cannot be made the ground of any claim in this statutory action, or relieve the case of the fatal defect of want of jurisdiction. *Bradley v. Mut. Ben. L. I. Co.*, 45 N. Y. 422; s. c., 6 Am. Rep. 115; *Butler v. Kent*, 19 Johns. 228; 10 Am. Dec. 219; *Hoey v. Felton*, 11 C. B. (N. S.) 142; *Cox v. Burbridge*, 13 id. 430; *Clark v. Brown*, 18 Wend. 229; Add. on Torts (3d ed.) 5.

RAPALLO, J. For the purposes of this appeal the wrongful act or neglect causing the death of the plaintiff's intestate must be

treated as having been committed upon the high seas. The complaint does not specifically allege that the disaster was caused by the unlawful or negligent lading of the petroleum on board of the vessel in the port of New York, and consequently the question whether that fact, if alleged, would establish that the wrong complained of was committed within the territorial bounds of this State, need not be considered.

We shall therefore come directly to the principal point argued, which is, whether under the statute of this State, which gives a right of action for causing death by wrongful act or neglect, an action can be maintained for thus causing a death on the high seas, on board of a vessel hailing from, and registered in a port within this State and owned by citizens thereof; the person whose death was so caused being also a citizen of this State, the vessel being at the time employed by the owners in their own business, and their negligence being alleged to have caused the death.

It is settled by the adjudications of our own courts that the right of action for causing death by negligence exists only by virtue of the statute, and that where the wrong is committed within a foreign State or country, no action therefor can be maintained here, at least without proof of the existence of a similar statute in the place where the wrong was committed. *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Crowley v. Panama R. R. Co.*, 30 Barb. 99; *Beach v. Bay St. S. Co.*, 30 id. 433; *Vandeerwerker v. N. Y. and N. H. R. R. Co.*, 27 id. 244. These decisions rest upon the plain ground that our statute can have no operation within a foreign jurisdiction, and that with respect to positive statute law it cannot be presumed that the laws of other States or countries are similar to our own. Opinion of DENIO, J., 23 N. Y. 467, 468, 471. The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one State or country for a personal injury, may be enforced in another to which the parties may remove or where they be found, yet the right or liability must exist under the laws of the place where the act was done. Actions for injuries to the person committed abroad are sustained without proof in the first instance of the *lex loci*, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries. But this presumption cannot apply where the wrong complained of is not one of those thus universally recog-

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nized as a ground of action, but is one for which redress is given only by statute.

Keeping these principles in view it is clear that in order to maintain this action it is necessary to establish that the statute law in question was operative on board of the vessel upon which the injury was committed. In all the cases which have been decided, the place of the injury was actually within the limits of a foreign territory, subject to its own laws, and where there could be no claim that the laws of this State or country were operative. In the present case the *locus in quo* was not within the actual territorial limits of any State or nation, nor was it subject to the laws of any government, unless the rule which exists from necessity is applied, that every vessel on the high seas is constructively a part of the territory of the nation to which she belongs, and its laws are operative on board of her. In this respect the case is new.

There can be no question that if this case were one arising under the laws of the United States the rule referred to would apply, and acts done on board of her while on the high seas would be governed by those laws. The question now presented is whether in respect to matters not committed by the Constitution exclusively to the Federal government nor legislated upon by Congress, but regulated entirely by State laws, the State to which the vessel belongs can be regarded as the sovereignty whose laws follow her until she comes within the jurisdiction of some other government.

The precise question arose in the case of *Kelly v. Crapo*, 45 N. Y. 86; s. c., 6 Am. Rep. 35; and 16 Wall. 610, though in a different form. The question there was whether a vessel upon the high seas was subject to the insolvent laws of the State of Massachusetts, to which State the vessel belonged, that is, where she was registered and her owner resided, so that by operation of those laws, and without any act of the owner, the title to the vessel could be transferred, while she was at sea, by a proceeding *in invitum*, to an official assignee, and his title thus acquired would take precedence of an attachment levied upon her in the State of New York after she had come within this State.

It was conceded in that case, in this court as well as in the Supreme Court of the United States, that unless the vessel was actually or constructively within the jurisdiction of the State of Massachusetts, her insolvent law could not operate upon her so as to defeat a title acquired under the laws of the State within whose

actual territorial jurisdiction she afterward came. 16 Wall. 622. But in support of the title of the assignee in insolvency it was urged that the rule before referred to applied to her, and that while at sea she was constructively a part of the territory of the State of Massachusetts, and subject to her laws.

This court held that the rule invoked was not applicable to a State, and State laws, but that the jurisdiction referred to was vested in the government of the United States, and that the National territory and its laws only were extended by legal fiction to vessels at sea.

This decision was reversed by the Supreme Court of the United States (*Crapo v. Kelly*, 16 Wall. 610), and as we understand the prevailing opinion in that court, it holds that the relations of a State to the Union do not affect its *status* as a sovereign, except with respect to those powers and attributes of sovereignty which have by the Constitution been transferred to the government of the United States, and that in all other respects it stands as if it were an independent sovereign State, unconnected with the other States of the Union. Upon this principle it was held that the vessel, while at sea, was constructively part of the territory of the State of Massachusetts and subject to its laws. 16 Wall. 623, 624, 631-632. It is difficult to conceive any other principle upon which that conclusion could have been reached.

In respect to crimes committed on the high seas, the power to provide for their punishment has been delegated to the Federal government, and for that reason State laws cannot be applicable to them; but I cannot escape the conclusion that under the principle of the case of *Crapo v. Kelly*, civil rights of action, for matters occurring at sea on board of a vessel belonging to one of the States of the Union, must depend upon the laws of that State, unless they arise out of some matter over which jurisdiction has been vested in and exercised by the government of the United States, or over which the State has transferred its rights of sovereignty to the United States; and that to this extent the vessel must be regarded as part of the territory of the State; while in respect to her relations with foreign governments, crimes committed on board of her, and all other matters over which jurisdiction is vested in the Federal government, she must be regarded as part of the territory of the United States and subject to the laws thereof.

The facts alleged in the complaint, and admitted by the demurrer

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present a strong case for the application of the rule that the laws of the State to which the vessel belongs follow her until she comes within some other jurisdiction. . The defendants, by whom the wrong is alleged to have been committed, were, at all times up to its final consummation by the death of the plaintiff's intestate, citizens and residents of this State, and subject to its laws, and the deceased was also a citizen of this State. The death was caused either by the illegal and negligent act, done in this State, of lading the dangerous and prohibited article on board the vessel and sending the deceased to sea in her thus exposed, or by the negligence or wrongful acts of the defendants committed at sea through their agents. The complaint does not distinctly specify which, but it must have been one or the other. If the latter, then at the place where the injury was consummated there was no law by which to determine whether or not it rendered the defendants liable to an action, unless the law of the State to which the vessel belonged followed her. In the present case the defendants were, at the time of the wrongful act or neglect, and of the injury, within this State and subject to its laws, and none of the objections, suggested in the various cases which have been cited, to subjecting them to liability under the statute for acts done out of the territory of the State, can apply. There can be no double liability, as suggested by DENIO, J., in 23 N. Y. 467, 471, for the *locus in quo* was not subject to the laws of any other country; nor can it be said that the deceased or his representatives were under the protection of the laws of any other government, as is said in some of the other cases cited. It is a case where no confusion or injustice can result from the application of the principle declared by the Supreme Court, that the laws of the State as well as of the United States, enacted within their respective spheres, follow the vessel when on the high seas. In the opinion of the court at General Term in this case it is expressly conceded that both the laws of the State and the Nation have dominion on a vessel on the high seas, but the demurrer was sustained on the ground that this right of jurisdiction has not been exercised by the State of New York, and its statutes are restricted in their operation to the actual territorial bounds of the State.

No such restriction is contained in the statute now under consideration. Its language is broad and general and by its terms it operates in all places. its operation on cases arising in other States

and countries has not been denied by reason of any thing contained in the act itself or in any other legislative act, but on general principles of law.

But the court rests its conclusion upon the act of the legislature of this State which defines its boundaries and declares that the sovereignty and jurisdiction of this State extends to all the places within the boundaries so declared (1 R. S. 62, 65), and it construes that act as a renunciation or abrogation of any effect which might on general principles of law be given to its statutes, on board of vessels on the high seas.

We are unable to concur in this view. The act referred to was intended to define simply the actual territorial bounds of the State, and the declaration that its sovereignty and jurisdiction should extend to all places within those bounds, was not intended to nor could it operate as a restriction upon subsequent legislation, nor had it any reference to such a question as that now before us. Whatever operation our laws may have on board of vessels at sea depends upon general principles, and there is nothing in the legislation of our State which places it in this respect on a different footing from any other. It is not claimed that the sovereignty and jurisdiction of this State extend to its vessels when at sea, as they do to places within its boundaries, for all purposes, such as service of process, the execution of judgments and the like, but only that when acts done at sea become the subject of adjudication here, the rights and liabilities of parties may in some cases be determined with reference to our statutes. There is nothing inconsistent with this in the act referred to, or in the assertion of sovereignty and jurisdiction for all purposes over places within the bounds of the State.

The decision of this court in *Kelly v. Crapo* is referred to as the highest evidence that this State never intended that its laws should extend to vessels on the high seas. That decision recognized the general principle that the laws of a nation do so extend, but was based upon the theory that the relation of the State to the Union was such that this attribute of sovereignty had become merged in the powers granted to the general government. But the judgment of the Supreme Court of the United States having established the contrary view, and that in matters not the subject of Federal legislation the laws of the State follows the vessel, thus making the laws of the State and of the United States, in their respective spheres, together constitute the law of the Nation to which the

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vessel belongs, we adopt that decision as the judgment of the tribunal to whom the ultimate determination of questions of that nature properly belongs.

There is nothing in the nature of this action which renders it exclusively the subject of Federal cognizance. The jurisdiction of the States and of the United States in the matter of personal torts committed at sea, such as assaults by a master on his crew, injuries to passengers and the like, are concurrent, though remedies by proceedings *in rem* can be administered only by the courts of admiralty of the United States. The field of legislation in respect to cases like the present one has not been occupied by the general government, and is therefore open to the States. *Steamboat Co. v. Chase*, 16 Wall. 522, 530, 533. Indeed the United States Court of Admiralty would have no jurisdiction in such a case (*Steamboat Co. v. Chase*, 16 Wall. 522, 530, 533; *Sherlock v. Allen*, 93 U. S. 99), and there is no greater objection to extending the operation of a statute of this description to a vessel at sea than there was to giving similar operation to a State insolvent law.

The judgment of the court below should be reversed, and judgment rendered for the plaintiff on the demurrer, with leave to the defendants to answer on payment of costs within thirty days.

Judgment accordingly.

All concur, except ANDREWS, J.. absent.

DICKINSON V. EDWARDS.

(77 N. Y. 573.)

Contract — note — usury — negotiation in another State.

Where a resident of this State makes a note here, dated, payable and intended to be discounted here, and specifying no rate of interest, and the note is first negotiated in another State, at a rate of interest lawful there but unlawful here, it is invalid for usury.

ACTION on a note. The opinion states the case. The defendant had judgment below.

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Walter R. Beach, for appellant. Defendant's liability must be considered the same as though he had made, dated and delivered the note to Mr. Pulsifer at Boston. *Merchants' Bank v. Griswold*, 72 N. Y. 472; s. c., 28 Am. Rep. 159; *Pomeroy v. Ainsworth*, 22 Barb. 127; *Tilden v. Blair*, 21 Wall. 241; *Cutler v. Wright*, 22 N. Y. 472; *Davis v. Garr*, 2 Seld. 124; 1 Pai. 220; 7 id. 632. The fact that the note was payable in the State of New York cannot vary the maker's liability or avoid the contract thus legally made in Massachusetts. *Bowen v. Bradley*, 9 Abb. Pr. (N. S.) 395; *Kentucky v. Bassford*, 6 Hill, 526; *McIntyre v. Parks*, 3 Metc. 207; Story's *Confl. of Laws* (Redfield's ed.), § 252; *Hosford v. Nichols*, 1 Pai. 220; *Chapman v. Robertson*, 6 id. 634; *Pratt v. Adams*, 7 id. 636; *Cook v. Litchfield*, 9 N. Y. 280; *Hyde v. Goodenow*, 3 Comst. 271; *Lee v. Selleck*, 33 N. Y. 615; *Bowen v. Bradley*, 9 Abb. (N. S.) 395; *City Sav. Bank v. Bidwell*, 29 Barb. 325; *Bank of Georgia v. Lewin*, 45 id. 340; *Balme v. Wombough*, 38 id. 352; *Depau v. Humphreys*, 8 Mart. (N. S.) 1; *Peck v. Mayo*, 14 Vt. 33; *Pope v. Nickerson*, 3 Story, 466; *Tilden v. Blair*, 21 Wall. 241; *Prov. Co. Sav. Bank v. Frost*, 13 Nat. Bank Reg. 358, 359; *Andrews v. Pond*, 13 Pet. 78; *Miller v. Tiffany*, 1 Wall. 310; *De Wolf v. Johnson*, 10 Wheat. 383; 2 Pars. on Cont. 584 (5th ed.), note *h*; 2 Pars. on Notes and Bills (2d ed.) 378; *Jacks v. Nichols*, 1 Seld. 178; *Curtis v. Leavitt*, 15 N. Y. 9; *Bowen v. Newell*, 13 id. 290; *Everett v. Vendreys*, 19 id. 436; *Cutler v. Wright*, 22 id. 472; *Pomeroy v. Ainsworth*, 22 Barb. 127.

W. S. Packer, for respondent.

FOLGER, J. This action is brought against the defendant as the maker of a promissory note. He did write and sign the note, and put it in the hands of the payees named in it, for their use. This is the form of it: "New York, November 14, 1874. \$300. Three months after date I promise to pay to the order of Messrs. Bailey & Gilbert three hundred dollars at the New York National Exchange Bank, value received."

His defense to the action is, that the note was made by him for the accommodation of the payees named in it; that it was by him loaned to them without any consideration received by him from them, and that it was transferred by them to the assignor of the plaintiff, at a greater rate of discount or interest than that

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lawful in this State. The facts of the case sustain these allegations of his defense. It is also fact that he signed the note at the city of his residence and place of business in this State; that it is dated there; that it is made payable there; that it was put in the hands of the payees there. Nor is there any thing to show that the maker knew, or intended, or contemplated that it was to be taken out of this State for its first use. There is another fact, however; and it is relied upon by the plaintiff to overcome the defense of the defendant. It is, that the note first passed into the hands of a holder for a consideration, and thus, as is alleged, had inception in the State of Massachusetts; that it was in that State that the discount or interest was taken, greater than that lawful in this State, and that it was lawful in that State to take that rate.

Upon these facts arise the questions of law, in which State was the note made; and if it was made in the State of Massachusetts, is it not valid everywhere? It may be granted that the note was made in Massachusetts, and that if the law of the place of execution is to govern, that the note is valid and enforceable in this State.

It would seem, at first sight at least, that the other of these questions had been settled in the negative, by this court. *Jewell v. Wright*, 30 N. Y. 259, was an action on a promissory note, signed by Wright in this State, to the order of Dunlap, who wrote his name upon the back of it in this State. The note was by its terms payable at a bank in this State. It was put in the hands of Taylor in this State for his accommodation, without consideration from him therefor. Taylor took it into the State of Connecticut, and got it discounted there, at a rate not lawful in this State. It does not appear that Wright or Dunlap knew or intended, or thought that Taylor would take it out of this State to make the first use of it in Connecticut. Thus the case is the brother of that before us. In one feature of it it is not like. The rate of discount was unlawful in the State in which the note was first used, as well as in this State. But as will appear further on, this difference was not material; and the questions of law were the same as those at which we are looking. Judgment went for the plaintiff, the holder of the note, in the courts below; but it was reversed in this court, and the case sent back. This court conceded that the law is, that a contract is to be governed by the law of the place where it is made, if it is not by its terms to be performed elsewhere, but held, that if by its terms it is to be performed in a State other than that in which it is made, the law

of the State in which it is by its terms to be performed must govern. Just this was determined, that where a note is signed in this State, by a resident thereof, at his place of business here, bearing date here; a place here fixed in it as the place of payment of it; no rate of interest named in it; no intention of the maker existing that it will be taken elsewhere for discount, it is invalid by the law of this State, when it was first negotiated in another State at a rate of discount greater than that allowed by the usury laws of this State. And these are exactly the facts in the case now in hand.

It is said, however, that the case of *Jewell v. Wright* has been so much questioned by bar and bench, as not to be a reliable precedent. One criticism upon it is, that as the note there was obnoxious to the usury law of Connecticut, as well as of New York, there was no need of the reasoning of the opinion, resting the judgment upon the rule that the law of the place of performance must govern; and that hence the opinion rendered was *obiter*. This criticism is not well founded. The usury law of Connecticut is not as fatal as that of this State. By the law of that State the contract is not utterly void, but void only as to the whole interest reserved or taken. *Fisher v. Bidwell*, 27 Conn. 363. So that, though the opinion in *Jewell v. Wright* starts with saying that the note was negotiated at a rate of interest illegal both in Connecticut and New York, it is correct in further stating the main question in the case to be, whether the laws of the former or the latter State are to control as to the defense of usury. In the one case, the plaintiff would lose only a sum equal to the amount of interest taken or reserved; in the other, he would lose the whole amount of the note.

We must say then, in the case before us, whether we will follow *Jewell v. Wright*, as an authoritative adjudication, binding upon us; or whether it is so plainly unsound in its declaration of what is the law, and in its application of it to the facts there shown, as that it should be overruled, and the proper rule for a like state of facts be now put forth.

The rule declared in that case is, that a personal contract is to be governed by the laws of the country which is named in it as the place for the performance of it. And in stating this as the rule, it was conceded that the law of the place where the contract is made governs the contract, when it is not by its terms to be performed elsewhere. This concession might have been made with a

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limitation, for no State is bound, or ought to enforce or hold valid, in its courts of justice, a contract which is injurious to its public rights, offends its morals, contravenes its policy, or violates a public law. 2 Kent Com. 458; *Varnum v. Camp*, 1 Green (N. J.), 326. But passing that, this court in *Jewell v. Wright* announced not a new principle, or one that is not now prevalent. The general rule is and has been, that where the contract either expressly or tacitly is to be performed in a given country, there the presumed intention of the parties is that it is to be governed by the law of the place of performance, as to its validity, nature, obligation, and interpretation. Story on Conf. of Laws, § 280, citing *Andrews v. Pond*, 13 Pet. 65, and *Merchants Bank v. Spalding*, 9 N. Y. 53, citing *Holman v. Johnson*, Cowp. 341. This rule has been specially applied to the rate of interest to be allowed; and it has been held that where a personal contract is expressly or by implication to be paid at a given place, and the rate is not fixed by the parties, interest is to be taken or reserved according to the law of the place where payment is to be made. *Fanning v. Consequa*, 17 Johns. 511; 8 Am. Dec. 442; *Scofield v. Day*, 20 id. 102; *De Wolf v. Johnson*, 10 Wheat. 367. It is said that such a rule of construction will not be applied if it will render the contract illegal; for that construction will be given to a contract which will render it valid, if it can be reasonably done. *Bowen v. Bradley*, *infra*. But this remark has no application to the case in *Jewell v. Wright*, or to that before us. There and here, no question comes up of the rate of interest to be allowed upon a clause in a contract expressly providing for it, and for the rate of it. There and here, the note was silent as to interest, and the rate adopted on the negotiation of it was more than the law of the place of performance allowed. Hence the only indication which the contract gives of the mind of the maker as to the rate of interest is in the phrase which specifies the place of payment, and the indication from that is of a rate lawful at that place.

Nor did *Jewell v. Wright* go to judgment without reliance upon authority. *Jacks v. Nichols*, 5 N. Y. 178, states as a ground of the decision in it, that the contract was to be performed in this State (see page 185); so *Curtis v. Leavitt*, 15 N. Y. 9, 227, recognizes the rule, and *Cutler v. Wright*, 22 id. 472, is much in point. The note there, made and delivered in New York, reserved, in terms, interest at the rate of eight per cent, but as it was dated and

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made payable in Florida, it was held to be a Florida contract, and not to be governed by the laws of this State on a defense of usury.

It is claimed that *Jewell v. Wright* has been so seriously questioned as to impair its authority, and to throw doubt upon the soundness of the rule it gives out, and that there are adjudications which stand in opposition to it. It is proper to look at the cases which are thought to have that effect. The most prominent is that of *Tilden v. Blair*, 21 Wall. 241. There are facts in that case which are not in *Jewell v. Wright*, nor in that before us. The action in that case was brought in Illinois, on a draft drawn and dated there by a resident there at his place of business, and though accepted and made payable in New York by the drawees, residents of New York, it was returned by the acceptors to the drawer in Illinois, for the purpose and with the intention on their part that it should be negotiated there by him, the understanding being that the draft was to be discounted by a bank in Chicago, and that the drawer should take it up at maturity. Now, the controlling fact in *Tilden v. Blair*, and so stated to be by the United States Supreme Court (see page 247), is that before the acceptance had any operation, before the instrument became a bill, the acceptors sent it to Illinois, for the purpose of having it negotiated in that State—"negotiated," says the court, "it must be presumed, at such a rate of discount as by the law of that State was allowable. The ruling consideration in that case was the intention of the acceptors that the draft should be used in Illinois, as a contract of that State, in accordance with its laws; and that the naming of New York city as the place of payment was an incidental circumstance, for the convenience of the acceptors, or to help the negotiation, and not as an essential part of the contract, or with the intent to affix a legal consequence to the instrument. There is no fact in *Jewell v. Wright*, nor in the case in hand, to show an intent in the maker of the note to give authority to deal with it otherwise than as the law of this State would allow, nor was there appearance of authority so to do. He had framed his writing so that it declared that the law of this State was to be the law of its nature and obligation. He made a place in this State the place for the performance of it, and there was naught in the writing, nor in his conduct outside of the writing, which would allow a belief or an inference that he did not mean that part of it to be an essential part of it, and to draw after it a legal consequence. The only

authority he gave to the payee was to be found in the fact that the latter by his act had in possession that writing, negotiable by its terms when indorsed by the payee, yet looking to the law of this State for its construction and validity. No one had a right to assume therefrom that the maker's gift of power was greater or other than that.

Another case is *Bank of Georgia v. Lewin*, 45 Barb. 340. It does not refer to *Jewell v. Wright*, much less question it. Indeed, the opinions in the two cases are from the same judge. The same fact is in it as is in *Tilden v. Blair*, that it was the purpose of all parties to the draft, when they made and accepted it, that it should be first used in another State than this wherein it was made payable, and that the place of payment named in it might be inferred to be incidental and not essential.

Bowen v. Bradley, 9 Abb. Pr. (N. S.) 395, decided in a court inferior to that which gave the adjudication in *Jewell v. Wright*, yet deliberately disregards it, and pronounces it contrary to law, to sound reason and the necessity of commerce. There was room in *Bowen v. Bradley* for the same reason that controlled the decision in *Tilden v. Blair*; and the case might well have gone upon the ground that both the maker and indorser of the note knew and meant that it would first be used in Illinois, and in accordance with the laws of that State. But the court chose to put it upon the ground that the law is different from what it is declared to be in *Jewell v. Wright*. This conclusion was sought to be sustained by reason and authority. It is first declared that this court failed to distinguish between the principles by which the validity of purely personal contracts is to be tested, and the rules which have been adopted for the interpretation of them. The court, in *Bowen v. Bradley*, must then have been of the opinion, that the rule that a contract must be governed by the law of the place where it is to be performed is a rule of interpretation, and not one by which to determine the validity of the contract, for as we have shown, it was that rule upon which *Jewell v. Wright* went; and we have shown that this rule is operative not only in interpretation, but in an inquiry as to validity, nature and obligation. Story on Conf. Laws, § 280, *supra*; *Andrews v. Pond*, *supra*. *Bowen v. Bradley* then proceeds to state what are the rules of law as to the validity of a purely personal contract: First, that if valid where it is made and to be performed, it is valid everywhere; which may be con-

ceded. Second, if it be made in a State or country where it would be lawful to do all the acts which are agreed by it to be done, but provides that one or more of such acts shall be done in another State or country in violation of its known laws, the courts (at least of the latter) will not enforce the contract. It then proceeds to state rules of interpretation: First, that such contracts are to be construed according to the intention of the parties. Second, that if a different intention is not apparent, the intent will be declared to be according to the law of the place of performance, and that thus the law of the place of performance is silently incorporated into the contract; and as an example it is said, if a note payable with interest, without naming the rate, is made or delivered in one State, by its terms payable in another State, the note by force of the rule of interpretation is to be paid at the rate of interest of the State where payable. The opinion then holds that such a construction would not be admitted if it would make the note invalid. Now a reading of these rules by the side of the facts of the case fails to show an error in the decision in *Jewell v. Wright*. Surely the place where the contract there, and here, was to be performed was the State of New York; and surely a note, upon the discount or negotiation of which more than seven per centum per annum was taken without the agreement of the maker, was not a valid contract by the law of this State. Surely the act of payment in that, and in this case, was to be done in this State; it could not be done without paying more for the loan or forbearance of money than at the rate just named. That payment was then an act in known violation of the laws of this State; and why then should the courts of this State enforce the doing of that act? The contract in *Jewell v. Wright*, and in our case, makes apparent no intention of the maker for a greater rate of interest than that lawful in this State. In neither contract is the matter of interest named. Is not then the place of performance named in it the place whose law must be presumed to have been in the intention of the makers as that which should control the rate to be taken? There can be no pretense that the meaning of the parties was not well expressed in the note in *Jewell v. Wright*, and was not to be fully understood therefrom, in respect to the thing to be done and the place where it was to be done. It was to pay a certain sum of money at a bank in the city of Lockport in this State. But it must be lawful to do that thing there, or the law of this State

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would not permit it, nor would its courts enforce it. It was not lawful there, to repay money for the loan of which a greater rate of discount was taken than seven per centum per annum. Plainly then the plaintiff in that case sought from the defendant through the courts of this State that he do an act which he was forbidden to do by our law. When the assignee of the plaintiff discounted the note, he knew that he took an agreement to do that act in this State; and he was bound to know that it was an act repugnant to the laws thereof (*Cambioso v. Maffett*, 2 Wash. 104); and in legal effect it was the same as if he did know and of intent violated those laws. It is said that there is no violation of the law of this State in the simple act of paying money in solution of a promise to do so, and that as the act of taking a discount at a rate unlawful by our law was not done in this State, no act against its law was done or to be done here. But the act of taking the unlawful discount is not complete until the note has been paid. It rests in agreement until then. When the note has been paid at the place of payment and the amount gone to the credit of the holder, then is the act first complete, and the law is then also violated, and within this State. It would be a novel and startling doctrine that the usury laws of a State could not be violated by a transaction agreed upon outside its bounds.

Bowen v. Bradley seeks support in the case of *Kentucky v. Bassford*, 6 Hill, 526; and the same case is cited on the points of the plaintiff in our case, and at the circuit. That case goes, however, upon the expressed ground that whether the bond sued upon was made in Kentucky or New York, the performance of it was to be made in Kentucky, and that in such case the construction and effect of it are the same as if it had been made in that State. Nor does *Hyde v. Goodnow*, 3 N. Y. 266, or *Merchants' Bank v. Spalding*, 9 id. 53, put forth any rule differing from that in *Jewell v. Wright*.

Neither the discussion in *Bowen v. Bradley*, nor the authorities cited there, show error in the rule put forth in *Jewell v. Wright*. Citations are made to show that the judge who delivered the opinion in *Jewell v. Wright* joined in decisions claimed to be irreconcilable therewith. 45 Barb. *supra*. It there be any weight in that, it is neutralized by his later citation of *Jewell v. Wright*, as of prevalent authority. *Hildreth v. Shepard*, 65 Barb. 269.

The case of *National Bank v. Morris*, 1 Hun, 680, while it doubts

Jewell v. Wright, does not depart from it. The same reason for the decision existed as in *Tilden v. Blair*, *supra*, while the ground upon which it was placed was that found in *Rosa v. Butterfield*, 33 N. Y. 665.

Another case is *Wayne Co. Sav. Bank v. Low*, 6 Abb. (N. C.) 76. The opinion in that case does not profess to add much to the reasoning of the court in *Bowen v. Bradley*, *supra*. There is the same assumption that the decision in *Jewell v. Wright* was hasty and ill-considered, an assumption unwarranted, in face of the fact that there was a dissenting opinion read in it, whence it is apparent that both sides of the question were presented, not only upon the argument of the case, but upon the consideration and discussion of it by the court. The opinion in 6 Abb. (N. C.), *supra*, concedes that where no rate of interest is fixed by the contract the rate is that lawful at the place of performance, but denies that this is the rule in respect to taking usurious interest. We cannot but think that the learned court ignored what is the conceded general rule, that the place fixed by the contract for the performance of it is an essential part of the agreement and gives the law which is to determine its validity. A note payable in New York, naming no rate of interest, is discounted in Massachusetts, at a rate usurious and unlawful in New York. If the maker pays that note in New York, and the holder receives payment there, usury is given and taken; an act is done by them unlawful in New York, *malum prohibitum*, and for which the penalty of a misdemeanor is incurred. It matters not where the contract is made, it is agreed that it be carried out in New York, and thus it is at the time of the making agreed that an act shall be done in violation of the law of the place where it is to be done; and then the courts of that place are invoked to enforce the doing of an act which the law of their sovereignty forbids. We refrain from any consideration of the facts in the case from 6th Abbott, for we know not but that it is on its way to us for review. There may be matter in it to distinguish it from *Jewell v. Wright*, and from the case before us.

In *Prov. Co. Sav. Bank v. Frost*, 13 Nat. Bank Reg. 356, the maker of the note himself sent it into the other State for discount there in accord with its law; and it is upon that fact that that case went; and the judgment is based upon *Tilden v. Blair*, *supra*.

The case of *Scudder v. Union Nat. Bank*, 1 Otto, 406, does not establish any thing contrary to our views. The question there was,

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what jurisdiction should be sought for the law of the validity of a contract, when the validity of it was dependent upon the formalities alone with which it was formed. It was held that the *lex loci contractus* gave the rule; yet it was conceded that the law of the place of performance governed the incidents of payment including that of the rate of interest when it was not specified. Some things are said in the opinion which, apart from the facts, seem to go further.

These are all the cases brought to our notice in which adverse comment is made or implied upon the decision in *Jewell v. Wright*. The reasoning of them, in our judgment, fails to touch, or touching, does not shake, that of the case criticised.

But it is claimed that that case is contrary to the following authoritative adjudications in this State. *Hosford v. Nichols*, 1 Pai. 220, holds only that a contract for sale of lands in this State, made in this State, reserving interest at a rate lawful here, silent as to place of performance, may be performed in fact in another State, and that a mortgage on the same lands taken there in part payment, reserving the same rate of interest, though an unlawful rate there, will be enforced here. *Chapman v. Robertson*, 6 Pai. 627, is a case often cited and relied upon; but it does not impugn the general rule, that the validity of a purely personal contract is to be tried by the law of the place of its performance. The learned chancellor concedes that the case would have come clearly under that principle, if the contract in suit had been only the personal contract of the defendant; but he holds, that as it was a mortgage, actually executed here, by a resident here, upon lands here, for moneys loaned to be used here, though to be repaid elsewhere, the law of this State would fix the legality of the rate of interest reserved; and he further reasons that the contract was partly made here actually in reference to our laws, with an appeal to our courts contemplated by the parties, if necessary. The opinion in that case has not escaped criticism: "If viewed as the chancellor interpreted the case, it is perhaps irreconcilable with other cases and with general principles." Story on Confl. of Laws, § 293 c. "It appears to me that the case was correctly decided, but * * * upon principles and expositions to which I cannot assent, and which appear to me inconsistent with the general reasoning of the authorities." Id., note 3. See, also, *Curtis v. Leavitt*, 15 N. Y. 88, 228. *Pratt v. Adams*, 7 Pai. 615, 636, holds in effect that a contract for a

loan of money may stipulate for a rate of interest lawful where the contract is made, though greater than that where it is to be performed, if it was not a means of evading the usury law of the place of performance. This is not the case before us, nor the case in *Jewell v. Wright*. The maker of the note in those cases expressed no such stipulation in his contract, nor did he give authority to make it outside the written contract. There is nothing in *Cook v. Litchfield*, 9 N. Y. 280; *Hyde v. Goodnow*, 3 Comst. 271; *Lee v. Selleck*, 33 N. Y. 615, which militates with the reasoning or the conclusions in *Jewell v. Wright*.

Citations are made from the reports of other States and from text-books. With the exception of *Depau v. Humphreys*, 8 Mart. (N. S.) 1, they make rather for than against the principle stated and founded upon in *Jewell v. Wright*. Thus in *Pecks v. Mayo*, 14 Vt. 33, it is said that it is an elementary principle, that all the incidents pertaining to the validity and construction of contracts will be governed by the *lex loci contractus*, which term may indicate where the contract is virtually made according to the intent of the parties, that is, the place of its performance, and that the general rule is that the latter is the governing law of the contract. That was a case where the inquiry was what law of interest should determine what damages were recoverable. So in *Pope v. Nickerson*, 3 Story, 465, it is said: That in general the validity, the nature, the interpretation and the obligations of contracts are to be governed by the law of the place in which they are to be performed. *Depau v. Humphreys*, *supra*, was cited and approved of by the chancellor in *Chapman v. Robertson*, but is condemned by Story. See *Conf. of Laws*, § 298 *et seq.*

We find nothing in the citations made to us, nor elsewhere, that shakes the general rule of law of this State that a purely personal contract is to be governed by the law of the place where by its terms it is to be performed. We find that some cases have set up exceptions from that general rule. It is not needed that we assent or dissent. None of the exceptions are found in *Jewell v. Wright*, or in the case before us. We are satisfied that the ground is stable on which the adjudication in that case rests. We follow it as an authoritative precedent and as well decided.

The judgment herein appealed from should be affirmed.

Judgment affirmed.

All concur, except RAPALLO and DANFORTH, JJ., dissenting.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

LORD V. HARDIE.

(82 N. C. 241.)

Religious society — levy on property of, on judgment for pastor's salary

The pastor of a religious society got judgment against the trustees for his salary, and a levy was made on the church communion service. *Held*, invalid.

THE opinion states the case. The plaintiff had judgment below.

T. H. Sutton, for plaintiffs.

Guthrie & Carr, for defendant.

SMITH, C. J. This is a controversy submitted without action upon a case agreed, the facts of which are as follows :

The defendant, as sheriff, by virtue of a writ of *fieri facias* issued to him on a judgment recovered by John A. Farior, former pastor of the First Colored Baptist Church of Fayetteville, against the plaintiffs, trustees of said church, for his pastoral services, seized and took into his possession a silver pitcher, two silver plates and

two silver goblets, with the box in which they are kept, used in the public worship of the church, and constituting its communion service. The articles were purchased with money derived from the voluntary contributions of its members and donated to the church. The present proceeding is to recover possession, and the only question for us to determine is, whether these articles are liable to seizure and sale under an execution against the trustees?

We have been unable to find, nor have the researches of counsel furnished us with any decided case or authority bearing upon the point, for the reason perhaps that this is the first instance that an attempt has been made to subject property, so dedicated to religious uses, to the payment of a debt. We must therefore determine the question upon general principles.

Under the laws of this State every worshiping and organized body of men, constituting a religious congregation, is a *quasi* corporation, with power to remove and appoint at pleasure the trustees in whom its estate, real and personal, is vested for the sole use and subject to the control and management of the congregation. The trustees are depositaries of the naked legal title, with a capacity to sue and be sued, not generally, but only "for or on account of the donations and property so held or claimed by them, and for and on account of any matter relating thereto." And they are made accountable to the congregation for the use and management of the property they hold, and to surrender it to any person authorized to demand it. Bat. Rev., ch. 101.

It is thus apparent that the trustees hold the property vested in them by law, in their corporate capacity, for the exclusive use of the congregation and under its direction and control. They do not participate in the employment of a pastor nor are they liable for his services.

If a sale under a *fieri facias* against the trustees could have the effect of transferring the legal estate, the purchaser would become a trustee and the trusts would follow and attach thereto. The result would be to substitute him in place of the trustees, and defeat that provision of the law which makes the tenure of office dependent upon the will of the congregation, and to compel a reconveyance. As a court of equity would in such case interpose to prevent such a proceeding, the court as now constituted will not permit to be done that which, if done, would affect injuriously the beneficial owners and be of no practical advantage to the party.

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And so it is held that the grantee of a trustee will not be allowed to recover the land from the owner of the equitable estate entitled to possession, nor from his assignee. *Stith v. Lookabill*, 76 N. C. 465.

We are not prepared to concede that such articles, dedicated to religious use exclusively, and necessary in public worship, are not protected by law from seizure and sale under the constitutional guaranty that secures the people in the unmolested "right to worship Almighty God according to the dictates of their own consciences," to which private interests must yield. But it is not necessary to determine the point. The trustees not being endowed by law with capacity to divert the property to other and different purposes nor in their corporate character, to contract a debt for which they can be taken, we are of opinion that the seizure by the sheriff, under the writ, of the articles was unauthorized by law, and under the terms of the case agreed, must be surrendered, and it is so adjudged.

Judgment affirmed.

No error

JACKSON V. LOVE.

(82 N. C. 405.)

Negotiable instrument — evidence — possession of unindorsed note.

Possession of an unindorsed note, payable to a particular person, by another than the payee, is presumptive evidence of ownership, and he may recover, although a statute requires every action to be prosecuted in the name of the real party in interest.

ACTION on the following note:

"One day after date we promise to pay W. W. Stringfield one thousand dollars, for value received. Witness our hands and seals this 29th October, 1872.

(Signed)

J. L. LOVE, [SEAL]
R. G. A. LOVE. [SEAL]"

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The defendants denied the plaintiff's title. On the trial the plaintiff produced the note and read it as evidence to the jury. No other evidence was offered. The plaintiff was nonsuited.

Marcus Erwin and W. H. Malone, for plaintiff.

J. L. Henry and A. W. Haywood, for defendant.

SMITH, C. J. The only question presented in the record is this: Does the possession of an unindorsed negotiable note or bond raise a presumption that the person producing it is the real and rightful owner, and entitled to the moneys due from the defendants, the promisors?

It is settled upon ample authority that the possession of a note indorsed in blank or payable to bearer is presumptive evidence of title in the holder, and the rule extends to a case where there are subsequent indorsements which he may strike out. *Picruet v. Curtis*, 1 Sumn. 478; *Warren v. Gilmore*, 15 Me. 70; 1 Danl. Neg. Inst., § 812; Pom. on Rem. and Rem. Rights, § 140.

In *Pettie v. Prout*, 3 Gray, 542, an action was brought on a note payable to the Chester Iron Works, of which plaintiff was the general agent, "or bearer," and with a view to use a set-off, the defendant contended that the note belonged to the company. The note was exhibited on the trial by the plaintiff, without further evidence. SHAW, C. J., thus declared the doctrine: "When the plaintiff brings the note declared upon in his hand and offers it in evidence, this is not only evidence that he is the bearer, but also raises a presumption of fact that he is the owner, and this will stand as proof of title until other evidence is produced to control it."

This and the other decisions referred to are based upon the principles of commercial law that govern and regulate the transfer of negotiable securities, in the interests of trade and to facilitate and render safe dealings in such paper. Will the same inference be drawn from possession in favor of a person, not the payee, holding an unindorsed note, under the statute which requires that "every action must be prosecuted in the name of the real party in interest," with an exception inapplicable to the present case? C. C. P., § 55.

In *Andrews v. McDaniel*, 68 N. C. 385, it is decided that the proper plaintiff is the party in interest and not the indorsee, the legal owner, unless he is also entitled to the money due, and parol proof was admitted of the plaintiff's equitable title.

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In *Abrams v. Cureton*, 74 N. C. 523, the plaintiff to whom the note had been indorsed was nonsuited on its being made to appear that it was under a contemporary agreement that he should collect, retain compensation for his services, and pay over the residue to the indorser. This recognition of equitable ownership of a negotiable bond or note, as property, seems to place it upon the footing of other personal property, and admit the application of the rule which infers title from possession, until the presumption is met and overcome by rebutting evidence. "As men generally own the personal property they possess," says Mr. Greenleaf, "possession is presumptive proof of ownership." 1 Greenl. Ev., § 34. "Upon the same principle," says Mr. Pomeroy, "the equitable owner of a promissory note is the real party in interest within the statute, and is the proper person to sue upon it, although there may be no indorsement, and possession of the instrument is *prima facie* evidence of such ownership." Rem. and Rem. Rights, § 140. He cites in support of the proposition, *Garner v. Cook*, 30 Ind. 331, in which the court say: "When *Vandagriff v. Tate* was decided, the equitable owner of a note could not sue upon it in his own name; now he can; and the *possession of the note is evidence of such ownership.*"

The judge in the court below held that the denial in the answer of the plaintiff's title had the effect of requiring from him proof beyond and in addition to the production of the note. In this we think he [misconceived the legal effect of the conflicting proceedings. The denial destroys the force of an allegation and puts the controverted fact in issue. It would do the same, in case the indorsee or bearer brought the action in his own name. But in neither case is the denial evidence against, nor the plaintiff's allegation evidence for, the truth of the disputed fact, to be considered by the jury. The issue is eliminated and presented in the form of a simple inquiry as to the plaintiff's ownership of the note in suit. The burden of proof rests upon him; and upon the authorities, the presumptive evidence is furnished when the note is produced and read in support of his title. As there was nothing shown to repel, the presumption should have prevailed, and the plaintiff by its force was entitled to the verdict. There is error in the ruling of the court, and the judgment must be set aside and a new trial awarded, and it is so ordered. Let this be certified error.

Venire de novo.

Belo v. Commissioners of Forsyth County.

BELO V. COMMISSIONERS OF FORSYTH COUNTY.

(82 N.C. 415.)

Taxation — of corporate stock to owner independently of corporation tax.

Stock of a corporation may be taxed to the owner, independently of taxation upon the corporate franchises and property.*

APPPLICATION for injunction. The opinion states the case. The application was granted below.

J. C. Buxton, for plaintiff.

Watson & Glenn, for defendants.

SMITH, C. J. The plaintiff is the owner of three hundred and forty-five shares of the capital stock of the North Carolina Railroad Company, which have been assessed and charged with an *ad valorem* tax in the manner prescribed by law, and the tax list has been made out and delivered to the defendant, Hill, the sheriff of Forsyth, for collection. This suit is instituted to restrain him and the county commissioners from levying and collecting the tax, on the ground of alleged exemption under the charter of the company, and for the further reason that all proper taxes upon the taxable property of the company are paid by the company.

It is conceded that the franchise and property of the company have been leased to the Richmond & Danville Railroad Company at an annual rent of \$260,000, or six and a half per centum per annum upon the par value of the stock ; that no dividends or distribution of profits has been made among the shareholders in excess of six per cent, and the half per cent has been appropriated to the payment of salaries and other necessary expenses of the lessor corporation, and the interest, and in reduction of the principal of its debt. Upon these admitted facts, a perpetual injunction was awarded and the defendants appeal.

The clause in the amended charter of the company which, it is claimed, protects the plaintiff from the demand of any tax upon his stock, is in these words: "That all real estate held by said

* See *City of Memphis v. Ensey* (6 Baxt. 553), 82 Am. Rep. 532.

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company for right of way, for station places of whatever kind and for work-shop location, shall be exempt from taxation until the dividends or profits of said company shall exceed six per centum per annum." Acts 1854-55, ch. 32, § 5.

This section has received an authoritative interpretation in the *R. & D. R. R. Co. v. Com'rs of Alamance*, 76 N. C. 212, and is thus explained by BYNUM, J.: "It is clear that the real estate which the company may own is not exempt, but such only as may be held by the company for the right of way, for station houses and for work-shop location. Real estate held and used for other purposes is not exempt from taxation. The exemption is coupled with a condition, and that condition equally attaches to each of the three purposes described in the act. Land held for the right of way is exempted for that use only; that held for station places must be applied to that purpose; and that held for work-shop location can be applied to no other uses than for work-shops. Otherwise, in each case the land so held becomes liable to taxation as other property." *N. C. R. R. Co. v. Com'rs of Alamance*, 77 N. C. 4.

Upon a statement of the facts essentially the same as those now before us, it has been held that the immunity conferred remains unimpaired. *R. & D. R. R. Co. v. Brogden*, 74 N. C. 707.

It is also settled that the franchise of the company and its property outside the exemption are liable as distinct subjects of taxation. *R. & D. R. R. Co. v. Brogden, supra*; *W., C. & A. R. R. Co. v. Com'rs of Brunswick*, 72 N. C. 10; *Bridge Co. v. Com'rs of New Hanover*, id. 15.

The only question then for us to consider is this: As all the property of the company, real and personal, is either given in for taxation and the taxes thereon paid by the company, or is exempt under the act, can the shares in the hands of the stockholders be also assessed and charged as an independent subject of taxation? The question is scarcely open to debate, and we shall only refer to some among the many authorities sustaining the affirmative of the proposition.

In *Gordon v. Appeal Tax Court*, 3 How. 133, Mr. Justice WAYNE thus expresses himself: "The franchise is their corporate property, which, like any other property, would be taxable, if a price had not been paid for it. The capital stock is another property, corporately associated for the purpose of banking, but in its parts, is the individual property of the stockholders, in the proportion they may own

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them ; and being their individual property they may be taxed for it as they may for any other property they may own. * * * A franchise for banking is, in every State in the Union, recognized as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government."

In an able opinion of the author of that valuable work on railways, commenting on the law, he says : " We here find the clear recognition of this kind of corporate property, taxable to the corporation, and the shares in the hands of the corporators, distinctly defined as a fourth species of corporate property, taxable only to the owners or holders. 1. The capital stock ; 2. The corporate property ; 3. The franchise of the corporation, all of which is taxable to the corporation ; and the shares in the capital stock which are taxable only to the shareholders." 1 Redf. Am. R. Cas. 497.

A tax on the shares of stockholders in a corporation is a different thing from a tax on the corporation itself, or its stock, and may be laid irrespective of any taxation of the corporation where no contract relations forbid it. Cooley's Const. Lim. 169; Field on Corp. 521.

A share of stock in a corporation is personal estate and is taxable to the owner thereof, as other personal estate, at the place of his residence. Burroughs on Tax., § 90.

Stock in a corporation is in the nature of a chose in action. It has no locality and of necessity follows the person of the owner. The tax upon it is in the nature of a tax upon income which of necessity is confined to the person of the owner. 1 Potter's Law Corp., § 192.

In Massachusetts it has been decided under a statute of that State that a citizen may be taxed for his stock in a turnpike company in another State. *Great Barrington v. Com'rs of Berkshire*, 16 Pick. 572.

In *Van Allen v. Assessors*, 3 Wall. 573, it is held that shares in a National bank may be taxed to the holder, although the whole capital is invested in securities of the National government, which an act of Congress declares to be exempt from taxation by State authority.

These references are sufficient to show that shares of stock in an incorporated company may be taxed as a distinct species of prop-

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erty, belonging to the holder, independently of the taxation imposed upon the value of the franchise and upon the real and personal estate of the corporation itself.

Has the legislature exercised its power to tax the plaintiff's stock upon its assessed value, and thus secured the uniformity prescribed in the Constitution?

The taxes covered by the restraining order were levied in 1878 under the requirements of the act of March 7, 1877, section 9 of which prescribes what the tax lists shall contain, and in paragraph 6, enumerates the following: "Stock, in National, State and private banks, and stocks in any incorporated company or joint-stock association, railroad or canal company, and their estimated value;" and this valuation is charged in the act of raising revenue with the *ad valorem* tax levied, and uniform on property. The stock must be listed in the county and townships of the owner's residence, where he resides in the State, as was decided upon the construction of the statute in *Buie v. Commissioners of Fayetteville*, 79 N. C. 267.

There is nothing unreasonable in the subjection of this form of property to its share of the common burden of taxation, necessary in the support of government. Income is or may be taxed, unless in the special case forbidden in the Constitution, from whatever source derived. Dividends are but net profits distributed among the shareholders, and if they must be taxed, why cannot the stock be taxed from which they proceed?

The subject may be considered in another aspect. The relation of the stockholders to the corporate body, for the purposes of the present inquiry, is very analogous to that of a creditor toward his debtor. The means and resources of the debtor, in connection with the skill, industry and integrity, impart value to his personal obligation, as property possessed by the creditor. It is not pretended that the assessment and taxation of the estate of the former where he may reside, or his estate may be found, should relieve the security, which the latter holds, from liability for its share of the common burden. The same principle, and with equal force, may be applied to the stockholder and the corporation. The latter must bear the taxation imposed upon its property, and this may diminish its distributable profits, but the stockholder cannot, any more than the creditor, claim exemption on this account for his stock, as distinct and separate property in his own hands.



Worth v. Commissioners of Ashe County.

It must therefore be declared that there is error in the record and the judgment must be reversed, and judgment entered here that the defendants go without day and recover their costs, and it is so ordered.

Judgment reversed.

Error.

WORTH V. COMMISSIONERS OF ASHE COUNTY.

(82 N. C. 420.)

Taxation — stock in foreign corporation — to owner.

Stock in a foreign corporation may be taxed to the resident owner.

APPPLICATION for injunction. The opinion states the case. The injunction was granted below.

Mason & Devereaux and G. V. Strong, for plaintiff.

Attorney-General, for State and county.

SMITH, C. J. This case differs from *Belo v. Com'rs*, 82 N. C. 415,* in a single feature. The plaintiff, Belo, residing in Forsyth county, held stock in the North Carolina Railroad Company, a domestic corporation, and claimed relief on the ground that the company itself returned and paid taxes upon all its taxable estate, and hence the tax on his shares was cumulative upon the same property and not uniform. The plaintiff, in the present case, holds three hundred and sixty-four shares of capital stock in the bank of Abingdon, a foreign corporation, existing under the laws of, and doing business in, the State of Virginia, and insists upon their exemption for the reason that all the corporate property is outside the limits of the State, and his stock is not subject to its taxing power. The principle involved in both cases is substantially the same, and is so fully examined in the other case as to require little to be added to what is there said.

In *Whitehall v. County of Northampton*, 49 Penn. St. 519, the question came up for consideration and the Supreme Court declared: "The defendant being a citizen of this State, it is clear

**Ante*, p. 688.

that he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the State, is equally within its authority. The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him."

The correlative proposition, the right of a State to tax the shares of non-residents in a domestic corporation, may admit of question; and in an able opinion of Judge REDFIELD, referred to in the other case, he held that such tax could not be levied, and in this case he is sustained by the decision in *Oliver v. Mills*, 11 Allen, 268. The act of Congress however confers upon the States wherein National banks may be organized, the authority to tax the shares of non-resident as well as of resident stockholders, under certain restraints, and to collect the same through the corporation.

That the general assembly has included among the subjects of an *ad valorem* taxation stocks held by its citizens in foreign corporations is apparent from the several provisions of the Revenue Act and that for the collection of revenue. Acts 1879, ch. 70, and 71. Taxes are levied "upon the true value of all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise." Ch. 70, class 1, § 1.

Every person is required to list his "real and personal property, moneys, credits, investments in bonds, stocks, joint-stock companies," etc., in his possession or under his control, on June the first, preceding. Ch. 71, § 4. The list must contain "any certificate of deposit in any bank, whether in or out of the State, certificate of stock in any corporation or trust company whether in or out of the State." Id. § 9, (5).

It is unnecessary to make further extracts to indicate the purpose of the legislature to include such property, as the plaintiff owns, among the subjects out of which its revenues are to be raised, as these are quite sufficient.

It must therefore be declared there is error in the ruling of the court and the judgment must be reversed, and judgment entered here sustaining the demurrer of the defendants and dismissing the action, and it is so ordered.

Judgment reversed.

Error.

STATE V. YEARBY.

(82 N. C. 561.)

Taxation — butcher not a "dealer."

One who slaughters and cuts up animals, and sells the meat as food, is not a "dealer" within the meaning of a statute requiring dealers who buy and sell goods, etc., to take out a license.

INDICTMENT for carrying on the business of a butcher without a license. The opinion states the case. The defendant was found not guilty by the court below.

Attorney-General, for State.

A. M. Lewis, for defendant.

SMITH, C. J. The defendant is charged with a violation of sections 12 and 32, schedule B, of the act of March 14th, 1879, entitled "An act to raise revenue," in failing to take out license to practice the profession of a butcher, and the jury render a special verdict, the material facts of which are found as follows :

The defendant between the first days of January and July of the year 1879, in the city of Raleigh carried on the business of a butcher, and was engaged in buying oxen, steers, cows, hogs and sheep, which he slaughtered, cut up and sold in pieces to various purchasers at his stall, without having any license or paying any tax therefor. Upon this finding the court adjudged the defendant not guilty and the solicitor appealed.

In the recent case of *State v. Chadbourn*, 80 N. C. 479 ; s. c., 30 Am. Rep. 94, we had occasion to examine and construe a similar provision in the Revenue Act of March 10th, 1877. The defendants in that case were proprietors of a steam saw and planing mill, and their business was to buy timber, and by sawing and planing, convert it into lumber and boards which they sold in the market. It was held that their calling was not within the purview of the act and they were not liable to the tax. The occupation of a butcher who purchases live animals suitable for food, and after slaughtering and cutting them, sells in pieces at his stall, is not dissimilar.

He does not buy and sell the same article and in the same manner as a mere trader. He buys a cow, a hog, or a sheep ; pork or mutton. His labor and skill have been employed in changing the form of the article and enhancing the price. The reasons for the exemption of the manufacturer of boards apply with equal force to the butcher. There is however some difference in the use of the expression, "and every other trader who, as agent, carries on the business of buying or selling goods or merchandise," used in the former act, the latter substituted "and every other dealer who shall buy and sell goods, wares or merchandise," and while, in the interpretation of the section, the law lays stress upon the word "trader," that substituted in the new act of the same import, as defined by Worcester, and which includes partnerships and associations, must be allowed the same force and effect. If the general assembly had intended to make the section comprehensive, language more direct and clear would have been used to convey their meaning. On the contrary, by coupling the acts of buying and selling, as descriptive of the dealer instead of disjoining them, as before when applied to the act of 1877, it must be inferred that the purpose was to make the law more explicit, and in conformity with the construction upon it. We must therefore adhere to our former decision and declare the butcher also exempt from the tax imposed by section 12 of schedule B.

Judgmen.

No error.

CASES
IN THE
SUPREME COURT
OF
OREGON.

MATASOH V. HUGHES.

(7 Or. 39.)

Evidence—note—presumption of settlement.

A note executed and delivered by one person to another is presumptive evidence of a settlement between them.

ACTION for work, labor, and services. The answer set up a counter-claim, and a settlement by note. The plaintiff had judgment below. The opinion states other facts.

Conley & Montanye, Humphry & Hewitt, Bonham & Ramsey, for appellant.

Powell & Flynn and R. S. Strahan, for respondent.

BOISE, J. [Omitting some minor considerations.] We will now consider the instructions of the Circuit Court as to the presumption of a settlement between the parties raised by the execution of the note of fifty-three dollars.

The court, in charging the jury, among other things, said : " That the giving of the note referred to in the answer of defendant would

be, in this case, slight evidence of a settlement between the parties of the business transactions had between them prior to the execution of the note. To which charge the appellant excepted. The appellant then asked the court to instruct the jury that the giving of the promissory note above referred to affords sufficient evidence of a settlement between the parties as an answer of defendant." Which instruction was refused, and the refusal is assigned as error.

These propositions will be considered together. A promissory note is *prima facie* evidence of an account between the parties of all demands between the time of the execution of the note. The presumption is *prima facie*, and is liable to be explained, but until explained it is taken as true, and affords sufficient evidence that the maker owed the payee the amount named in the note. See 261; *Lake v. Tysen*, 6 N. Y. 461. The counsel in this case asked the court to instruct the jury that this note was presumptive evidence of a settlement. Presumptive evidence being of two kinds, the one conclusive and the other liable to be rebutted by an explanation by the court, the jury might not be satisfied that the presumption asked for was conclusive or not, and the court might refuse the instruction for that reason. The court said to the jury that there was slight evidence of a settlement. This statement conveyed to the jury the idea that the evidence was not of convincing force, and if not explained, sufficient to establish the fact of a settlement. We think this instruction was erroneous. The court should have said to the jury that the note was sufficient evidence of a settlement unless rebutted by evidence in the case.

For the reasons above stated, we think there was error in this case, and that the judgment of the court below should be reversed and a new trial granted.

Jud.

SMITH V. WHEELER.

(7 Or. 49.)

Sale — heavy machinery — tender — action for price.

In case of an agreement to manufacture and deliver heavy machinery, an actual tender is not necessary, but readiness and an offer to deliver is sufficient to maintain an action for the price. (*See note, p. 703.*)

ACTION for the price of machinery. The opinion states the case. The plaintiff had judgment below.

T. B. Handley, for appellant.

Catlin, Killen & Nicholas, for respondents.

KELLY, C. J. This was an action brought by respondents against appellants to recover the contract price of certain machinery for a steam saw-mill manufactured by them for the appellants.

Substantially, the complaint alleges, that on the 21st day of November, 1877, the parties entered into a contract by which respondents agreed to construct for appellants a steam-boiler engine and a quantity of other machinery specified in the contract. It was to be completed on the 21st day of January, 1878, and delivered on that day on the cars of the Oregon Central Railroad, when and where appellants were to receive it and pay \$3,385.90 cents on the delivery thereof. Respondents allege that they completed the machinery and had it ready for delivery before the 21st day of January, and requested appellants to furnish cars on which to receive it, which they neglected and refused to do. They also allege that on the 21st day of January, appellants notified them that they could not receive or pay for the machine on that day, and requested respondents not to deliver it at that time, and they then paid \$400 on account. The respondents then aver that they were ready and willing to deliver the machinery, and have ever since been ready and willing to deliver it according to the terms of their contract, but appellants have refused to receive and pay for the same. They then demand a judgment for the contract price, less the sum of \$400 paid thereon. Appellants, in their answer, deny that the machinery

contracted for was completed and ready for delivery on the 21st day of January, or that respondents, at any time, requested them to furnish cars for transporting the same. They deny that on the 21st of January or at any other time, they notified respondents that they could not receive and pay for the machinery, and deny that respondents were ready and willing to deliver it according to contract, and that there is any thing due and owing them on account. The appellants, further answering, say that respondents did not notify them one week before the 21st of January that the machinery would be ready for delivery on the cars on that day. That on the 21st of January, they went to respondents' shop, and believing their representations to be true, that the machinery was completed, they paid \$400 thereon, and then requested respondents to defer the delivery of it for one week, in order to give them time to procure teams and cars for the transportation of it; that respondents agreed to this, and on the 28th of January cars and teams were secured by them at great expense, and they were ready and willing to receive and pay for it on that day, but that the machinery was not then completed and ready for delivery. The replication denies all the new matter set up in the answer. Judgment was rendered on the verdict of the jury for the amount claimed by respondents.

Several exceptions were taken by appellants to the instructions of the court, but most of them are to sentences detached from the context, and which cannot be fully understood without considering them in connection with other portions of the charge. We will therefore consider them together instead of separately, as nearly all the assignments of error relate to but one question, that is, whether the respondents did all they were required to do in order to constitute a tender of the machinery to the appellants, so as to entitle them to recover in this action. On this point the court charged substantially, that if respondents were able, ready and willing to complete the contract by delivering the machinery on board the Oregon Central Railroad on the 21st day of January, or any subsequent day agreed upon by the parties, if there was an extension of time for the delivery of it, and the appellants were not able, ready and willing to receive it on board the cars and pay for it on the 21st day of January or any subsequent day agreed on, then the respondents would be entitled to recover in this action, although they did not remove the machinery from the shop, and take it to the railroad.

The facts, as they are admitted by the pleadings or as set forth in the bill of exceptions, are in substance these: The respondents agreed to construct the machinery, and deliver it to appellants on board the railroad cars on the 21st day of January, 1878, when the appellants were to receive and pay the contract price, \$3,385.90. On that day appellants went to respondents' shop and were told that the machinery was done and ready for delivery. Being unable to receive it then, they paid \$400.00 on account and requested respondents to defer the delivery for one week, in order to give them time to obtain cars and teams to transport it. The appellants had not, at any time, the money on hand ready to pay or tender the balance of the price. This appears by the bill of exceptions. Nor did they either, on the 21st or 28th of January, have the cars at the place where the machinery was to be delivered at the railroad, nor were they there to receive or pay for it. The appellants claim that the court erred in its charge, and also in refusing to instruct the jury that "respondents were not entitled to demand payment until they delivered the machinery at the place designated in the contract." The court did not err, either in its charge or in refusing to give the instruction asked. The law undoubtedly is that where delivery of goods by a vendor at a particular place and payment of the price by the vendee are concurrent acts, an actual delivery or tender of the goods at the place is necessary in order to entitle the vendor to sue for the price, but there are exceptions to the rule, and this is one of them. The appellants did not have the necessary cars at the railroad depot upon which the machinery could be placed, and it was therefore impossible for respondents to deliver it on the cars or to tender it then. Nor would they have been justified under the circumstances in taking it to the railroad depot, and leaving it by the wayside where it would probably have been injured, or parts of it lost. The respondents undoubtedly knew that appellants had made no preparation whatever to receive it, and it would have been but an idle ceremony to haul the machinery to the depot, look around for the absent vendees to tender it to them, and then take it back to their shops. It is a legal maxim that the law never requires any one to do a vain or useless act—*Lex neminem cogit ad vana seu inutilia*.

The appellants however insist that even if the respondents have a cause of action it can only be for damages for a breach of the contract, and that they are not entitled to recover the stipulated price

because they still own the machinery, inasmuch as no actual delivery of it. There is a diversity among different courts upon this subject, where the property remains in the possession of the vendor. Mr. Sedgwick of it, says: "If the possession of the goods has not been delivered, it has been doubted whether the rule of damages is for the full contract price or only the difference between the contract price and the value of the article at the time fixed for its delivery. It is now settled in such cases that the vendor can resell the goods and charge the vendee with the difference between the contract price and that realized at the sale. But if the vendor pursues this course, and without reselling the goods, the vendee for his breach of contract, the question arises, already stated, whether the vendor can recover the full contract price or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule is that the vendor can recover the contract price in full. (Dam. 337 (6th ed.).

In the Supreme Court of Maine it is held that the vendor of an article for a customer who refuses to take any delivery cannot maintain an action for the contract price; that until delivery of the goods the title does not pass from the vendor. *Brown*, 34 Me. 107. In New York the rule is direct to the contrary. In a recent case, CHURCH, C. J., says: "In a sale of specific chattels, where nothing remains to be delivered by the vendor except delivery, whether conditioned upon payment or not, the right of property passed to the vendee, at least so long as the property is retained by the vendor. The same consequence as to the title follows from a valid tender upon an executory contract. Upon notice of the vendee to accept and pay the price, the vendor may sell the property and recover the difference between the contract and actual price. In either case he elects to retain the property as his own, or he may deliver it for the contract price, in which case he holds the property for the vendee, and is bound to deliver it whenever he receives payment of the price." *Hayden v. Deming*, 42 N. Y. 426; *Dustan v. McAndrew*, 44 id. 72.

The ruling in Pennsylvania is the same. In a case where a manufacturer of an article made to order had completed it upon notice of its completion the buyer refused to pay

it away, it was held that the maker might sue for its value, and the measure of damages was the contract price. *Ballentine v. Robinson*, 46 Penn. St. 177. When a vendee refuses to receive and pay for ordinary goods, wares and merchandise which he has contracted to purchase, the measure of damages which the vendor is entitled to recover usually is the difference between the contract and the market price of the goods at the time when the contract was broken. Yet where the subject of the sale is a specific article of property to be manufactured by the vendor for the vendee, and the former has completed the contract and performed all that he is required to do under it, there seems to be no good reason why he should not be entitled to recover the price agreed upon in the contract. Here it is not strictly the case of a sale of merchandise. The respondents agreed to make certain machinery according to the directions of the appellants, and to furnish the necessary materials for it. When it was completed and ready for delivery the appellants either neglected or refused to furnish the cars upon which it was to be delivered, as they had agreed to do. Under these circumstances, we think the right of property was clearly in them. They alone were in default, and there is therefore no just reason why the respondents should be compelled to accept the machinery in part payment of their demand, and sue for the balance. Nor is there any reason why they should be subjected to the risk and trouble of a resale for the benefit of appellants. The just rule in such cases is that when the vendor of an article has manufactured it according to order, and offers to deliver it to the vendee in accordance with the agreement, who refuses to accept it, the vendor should be entitled to sue for and recover the contract price.

The judgment of the court below is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.— In *Moody v. Brown*, 84 Me. 107, the manufactured article had been delivered but not accepted, and the court below held that no action could be maintained for the price. The court said: "There is not a perfect agreement of the decided cases upon the question presented by the exceptions. The law appears to be entirely settled in England in accordance with the instructions. *Atkinson v. Bell*, 8 B. & C. 277; *Elliott v. Pybus*, 10 Bing. 512; *Clarke v. Spence*, 4 Ad. & El. 448. The case of *Bement v. Smith*, 15 Wend. 498, decides the law to be otherwise in the State of New York." "SAVAGE, C. J., appears to have considered the plaintiff entitled upon principle to recover for the value of an article manufactured according to order, and tendered to a customer refusing to receive it. This can only be correct upon the ground that by a tender the property passes from the manufacturer to the customer against his will. This is not the ordinary effect of a tender. If the property does not pass, and the manufacturer may commence an action and recover for its value, while his action is pending it may be seized and sold by

Heilner v. Union County.

one of his creditors, and his legal rights be thereby varied, or he may value twice, while the customer loses the value. The correct principle has been stated by TINDAL, C. J., in the case of *Elliott v. Pybus*, that the right to recover for the value depends upon the question whether the property has been transferred to the customer. The value should not be recovered of the customer until he becomes the owner of the property, and can protect it against any claim of the manufacturer. To effect a change in the property there must be an assent of both parties. It is admitted that the mere order given for the manufacture of the property does not affect the title. It will continue to be the property of the manufacturer until it is completed and tendered. There is no assent of the other party to a change of property effected by a tender and refusal. There must be proof of an acceptance respecting it, from which an acceptance may be inferred, to pass the title. The decision strikes below the principal case in holding that not even a refusal to accept where actual tender is excused, will sustain the action for the price.

In *Dustan v. McAndrew*, 44 N. Y. 72, the court said: "The vendor in a suit against the vendee for not taking and paying for the property may ordinarily of either one of three methods to indemnify himself. (1) He may retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on sale. (3) He may keep the property as his own, and recover the difference between the contract price at the time and place of delivery, and the contract price. 2 Sedg. on Dam. 282; *Lewis v. Greider*, 49 Barb. 606; *Pollen v. LeRoy*,

HEILNER V. UNION COUNTY.

(7 Or. 83.)

Negligence — county bridge — notice of defect

In an action against a county for damages resulting from a defective bridge, actual or implied notice to the county of the defective bridge must be shown.

ACTION for injury by reason of a defective public bridge. The opinion states the case. The defendant had judgment for the county.

L. O. Sternes, John J. Balleray and Bonham & Co. appellants.

Frank M. Ish, for respondent.

PRIM, J. This is an action in which appellant seeks damages for an injury to his goods, wares and merchandise resulting from the breaking down of a certain bridge in Union County, Oregon, whereby said goods were precipitated into the river and

injured. A demurrer having been sustained to the complaint, on the ground that it does not contain facts sufficient to constitute a cause of action, the court rendered judgment against appellant for costs, from which judgment this appeal is taken.

It is objected that the complaint is defective and insufficient, for the reason that it is not alleged therein that the county authorities of said county had notice that said bridge was out of repair and in an unsafe and dangerous condition at the time when the accident occurred.

In the case of *Mack v. City of Salem*, 6 Or. 275, it was held that in order to maintain an action of this character against a municipal corporation on account of its streets being defective and out of repair, it must be alleged and proved that the corporation, or its officers, had notice of such defect and want of repair, or at least a state of facts shown from which notice might be inferred.

This rule, we think, applies with equal force to complaints in actions against counties for injuries resulting from their roads and bridges being out of repair. The allegations of the complaint bearing upon this part of the case are as follows: "That while the team hauling said goods was crossing said river on said bridge, with but one ordinary load of freight thereon, said bridge broke down and precipitated said goods into the waters of Grand Ronde river; that the breaking down of said bridge, as herein stated, was caused by the carelessness, negligence and refusal of said defendant to keep said bridge in good repair, and which it was in duty bound to do, as aforesaid."

These allegations, we think, are insufficient to show negligence on the part of respondent or its officers. To charge the respondent with negligence it should not only have been averred that the bridge was defective and out of repair, and in what particular, but that the county authorities knew of it, or a state of facts averred from which they might have known it with reasonable diligence, and with such means of knowledge within their possession, neglected and failed to repair within a reasonable time.

The breaking down of the bridge in question may have been caused by some latent defect which could not have been seen with ordinary diligence, or it may have been the result of a sudden freshet in the river occurring only a short time prior to the alleged accident; in either of which events it could not be said that the

respondent was chargeable with negligence. Although cannot be held liable for every accident that may occur in consequence of roads and bridges being out of repair, yet it is the duty of their road supervisors to keep vigilant watch over them when it comes to their knowledge that they are in a defective condition, they are bound to use reasonable diligence in repair, and if they fail to do so they are chargeable with negligence. The counties are liable in damages to any one who may be injured either in person or property in consequence thereof. A road supervisor may have no actual knowledge that a bridge is out of repair, yet if the attending circumstances show that he might have known it with ordinary diligence, he is chargeable with notice.

But it was claimed, on the argument, that this could not come within the rule laid down in the case of *MacSalem*, because there no negligence was alleged, while it was claimed that it was. If a verdict had been taken in the case, the defective pleading might probably have been cured, but as it stands here upon demurrer with no intendment or purpose in its favor, and under a familiar rule in pleading construed most strongly against the pleader.

To allege that the bridge broke down with but one load of freight thereon, and that it was caused by the negligence and refusal of said respondent to keep said bridge in repair, is insufficient on demurrer to show negligence constituting negligence should be averred.

Judgment

STEEPLES V. NEWTON.

(7 Or. 110.)

Contract for labor — breach — recovery quantum meriti

Where one fails fully to perform a contract for labor, for any reason, voluntary abandonment, and the labor rendered is valuable, he is liable for the value of the labor performed less any damages sustained by the party for the breach.*

*See *Leopold v. Salkey* (89 Ill. 412), 31 Am. Rep. 98, and note, 11

ACTION for work. The opinion states the case. The plaintiff had judgment below.

T. H. Tongue, for appellant.

T. B. Handley, for respondent.

BOISE, J. The respondent in this case alleges in his complaint that he performed labor for appellant in ditching, and alleges his labor to be of the value of seventy-three dollars and eighty cents, and claims a balance to be due him of sixty-two dollars and interest, for which he demands judgment.

The appellant answered, and in his answer alleges that whatever labor the plaintiff performed for him was performed under and in pursuance of a written contract between the parties, which contract is set out in the answer. The appellant alleges that the respondent has not completed said contract; that he has not dug the said ditches mentioned in the contract or any part thereof according to the terms of the contract, and that all said ditches were at the commencement of this action and at the date of the answer uncompleted and unfinished, without appellant's fault. In said answer appellant further alleges that he has been damaged by reason of the plaintiff's failure to comply with said contract, in this — that he was unable to have the ditches completed, and lost the use of his land to his damage in the sum of one hundred dollars.

The respondent, in his reply, denies the damages, and alleges as a reason for not completing the ditches that the appellant changed the stakes locating the same, which he says were fixed at the time the contract was signed, and located the said ditches on ground where it would be more expensive to dig them; that he offered to dig the ditches on the ground where the same were located at the time of the signing of the contract, and where he agreed to construct them, but appellant forbade him. On the issues raised by these pleadings the parties tried the case, and the jury found the general verdict for the plaintiff, for thirty-four dollars and thirty-three cents.

[Omitting minor matters.]

The second instruction objected to is as follows: "If the plaintiff abandoned his contract without cause he is entitled to recover the reasonable value of his labor, subject to the offset by the damages

sustained by defendant by reason of plaintiff's non-compliance with his contract."

The determination of the propriety of this issue is a vexed question, on which the authorities are not uniform. The Circuit Court seems to have followed the rule laid down in Parsons on Contracts, vol. 2, 523, which is an authority of the case of *Britton v. Turner*, 6 N. H. 481. It was held that where one party, without the fault of the other, fails to perform his contract for labor in such a manner as to render it impossible to sue upon it, still, if the party for whom the labor has been performed has derived a benefit from the part performed, the party who has performed may recover the reasonable value of such labor. This is the rule of *indebitatus assumpsit* for work and labor. In the present case, the plaintiff offered evidence to prove that the work was done by him for one year for the sum of one hundred dollars, and that the plaintiff left his service without his consent and without any just cause." The learned judge instructed the jury that if the points should be made out, yet the plaintiff was entitled to recover under his *quantum meruit* as much as the work was reasonably worth, and this instruction was held to be correct. This case seems not to have been followed in other States. It is discussed in the case of *Olmstead v. Beal*, 19 Pick. 529, where the court say that they have no hesitancy in adhering to the rule before established in Massachusetts, which is supported by a long series of adjudications. It was held in the case of *Fuller v. Brown*, 11 Vt. 620, where the plaintiff contracted with the defendant for four months, at ten dollars per month, and not to be paid until he had worked the four months, and before he had done so he became disabled and unable to perform the work; it being the act of God, the contract was discharged, and the plaintiff was to recover the reasonable value of his labor, and the same rule was applied in the case of *Leaver v. Morse*, 20 Vt. 620. The same rule is followed in Massachusetts. *Fuller v. Brown*, 11 Mass. 440, and *Beal*, 19 Pick. 529, above cited. The latter rule is now announced by this court at this term, in the case of *Steeple v. Newton*, where the decision of the question was not made until after the determination of the case and was consequently not binding. Where one performs services for another on a special contract, for any reason except a voluntary abandonment, failure to comply with his contract, and such compliance becomes

and the service has been of value to him for whom it was rendered, he may recover for such service its reasonable value, after deducting therefrom any damages the party for whom the service was performed has sustained by reason of such failure."

Since deciding that case, we have more fully considered this very important subject, and think the rule here laid down to be just and reasonable, and it is supported by most of the modern authorities. To adopt the rule that in all cases a party shall be held to a literal compliance with his special contract before he can recover any thing for labor, is too harsh and would often be unjust; and on the other hand, to hold to the rule as stated in the case of *Britton v. Turner*, 6 N. H. 481, that a person may voluntarily abandon his special contract and lose nothing thereby, would have a tendency to encourage bad faith and lessen the sacredness of solemn obligations, which it is the duty of the courts to uphold and enforce so far as the same can be done without doing manifest injustice. It would be unjust to require a total performance in cases where the party in default has bestowed his labor for the benefit of his employer and fails fully to comply with the terms of his contract from some accident or misfortune which does not involve willful neglect or abandonment on his part. We think, therefore, that this instruction of the Circuit Court was incorrect and might have influenced the verdict of the jury to the damage of the appellant.

[Omitting a minor point.]

Judgment reversed.

TRULLINGER V. KOFOED.

(3 Or. 228.)

Mechanics' lien—waived by taking mortgage.

A mechanics' lien on real property is waived by the lienor's acceptance of a mortgage on such property for the amount due on such lien.

SUIT to foreclose a mechanics' lien. The lienor had accepted a mortgage on the premises to secure the amount of his lien. The plaintiff had judgment below.

O. F. Bell, for appellant.

J. Q. A. Bowlby, for respondent.

a deed of conveyance for fraud or mistake unless mistake be proved beyond a reasonable doubt. *Lewis* 177; *Newsome v. Greenwood*, id. 119; 2 id. 290; It is the duty of the court to sustain the fairness of a deed unless the fraud be clearly proved. *Husford v. Husford*. It may be claimed that the execution of the deed should be scrutinized closely, because the relation of husband and wife existed between the parties. We do not think such a principle of law exists; but if it did it could not be applied here, because the agreement to marry and to make a deed were made at the same time and constitute but one agreement. A principle might possibly be invoked as to any deed occurring after the relation was created. If the deed was made by fraud, then it was voidable, and the grantee is to be treated as the trustee of the grantor, and the equitable interest remains in her. Hill. on Trustees, 144; 1 Story 1195, 1265.

Knight & Lord, and *Lawson & Sehlbrede*, for the respondent, say that the court below, by its decree, set aside the deed made by the respondent's mother to the appellant, and further decreed that the land should remain in the land. The court misapprehending the doctrine of Justice KENT, in *Sands v. Codwise*, 4 Johns. 598; suppose that the deed from the respondent's mother conveyed to him no estate whatever in the land, but that it was void *ab initio*. And therefore the respondent's mother, before her marriage and during her coverture was seized of the land in her own inheritance.

In the case of *Sands v. Codwise*, the conveyance was made to defraud creditors, and the chief justice very properly held that, by the statutes of Elizabeth, the deed was void as to the creditors, by analogy between that case and this. There is a difference between a deed made to defraud creditors and a deed made to defraud the grantor. In the first case, the grantor and the grantee are *in pari delicto*, and the grantee will hold as against the grantor; but in the last case the grantor is an innocent party, and the deed is void as against the grantee. 2 Pick. 194. Therefore the respondent's mother was voidable only and not void, and was therefore at no time during coverture seized of an estate in the lands conveyed by that deed. See 2 Pick. 183; 13 Am. Dec. 406, and cases cited.

There is no such thing as curtesy in an equitable estate at common law. Courts of equity, it is true, allowed curtesy of trusts and of other interests, which, although mere rights in law, were deemed estates in equity. But of these estates, courts of equity never allowed curtesy, unless the wife, during coverture, had the use and benefit of them, that is, enjoyed their rents and profits. 1 Wash. on Real Property, 130; 1 Pet. 508.

In this case, the respondent's mother had not even a bare right in law to the land; her right was in equity, and she never enjoyed during coverture the rents and profits of the land. "Where a husband, solvent at the time, owing no debts, conveys all his real estate to his wife, the conveyance, though void in law, is valid in equity, and on the death of the wife the husband is not entitled to an estate by the curtesy, but the land descends direct to the heirs of the wife, free from the lien of any debts contracted by the husband subsequent to the conveyance." In this State there is no dower in equity. 2 Or. 29; 5 id. 113.

BOISE, J. This is a suit in equity brought by the respondent to annul a deed made by her mother, Mary A. Monroe, to the appellant on the 23d day of January, 1877, for a tract of land in Yamhill county, for alleged fraud and undue influence in obtaining it.

The amended complaint alleges, in substance, that on the 23d day of January, Mary A. Monroe, the mother of the plaintiff, was seized as owner in fee-simple of the lands described; that on said date, and for a long time prior thereto, she was very infirm and diseased in mind and body, and was wholly incapable and unfit to properly manage her own business; that at said date her mental and physical condition was such as rendered her unable to guard herself against the imposition, or to resist the importunity or undue influence of the defendant; that the defendant, taking advantage of the mental weakness of the plaintiff's mother, and of her physical infirmities, and with the intention of procuring from her a deed to said lands, sought and obtained the affections of the plaintiff's mother, and engaged himself in marriage with her; that the defendant thereafter seduced her and got her with child; that during their engagement, and prior to their marriage, the defendant frequently importuned her to make him a deed to said lands, and refused to marry her until she did so; that the plaintiff's mother, unable further to resist the demands of the defendant without expos-

ure of her condition, yielded to the solicitations of the defendant, and made him a deed to said land of January, 1877; that the defendant procured said undue influence and without any consideration with plaintiff's mother and the defendant intermarried on the 24th day of January, 1877, one day after the deed; that the mother of the plaintiff died intestate; that the plaintiff is her only child and defendant has had the possession of said premises January 23, 1877, etc.

The answer denies the allegations of mental unsoundness, infirmity, undue influence, importunity, imposition, want of consideration, etc. It then alleges, in substance, that the defendant and Mary A. Monroe entered into an agreement, whereby the defendant promised to pay off her indebtedness which she owed him, pay her \$300 in cash, and give her; and in consideration thereof, she promised to give him, and deed him the land in controversy in this case. In accordance with said agreement, said Mary A. Monroe on the 23d day of January, 1877, deed said lands to the defendant, and on the next day, in accordance with said agreement, the defendant married her, and that the defendant, in accordance with said agreement, paid her the said \$300, released what she owed him, and her debts, amounting in all to \$1,412.94 and that the deed complied in all respects with the conditions of said agreement; that Mary A. Monroe was, at the time of the execution of said agreement and the execution of said deed, of sound mind and capable of comprehending all her said acts and that said agreement and said deed were executed by her free will, and without any fraud or undue influence. The answer purports to have been executed for the consideration of \$500, but that the true consideration therefor was the agreement that at the time of the execution of said deed there should be on said land for \$500 and interest; and that said deed provides that the grantee should pay and satisfy the same, that he did accordingly pay the same, amount in gold coin; that the defendant is the owner in fee of said lands, etc.

The reply substantially denies all of the allegations in the answer.

The court tried the cause and rendered a decree setting aside the deed, etc. From this decree the defendant appeals.

It is claimed by the respondent that Mary A. Monroc, the mother of respondent, was, 1. Of a weak and infirm mind at the time of the execution of the deed. 2. That the deed was obtained by undue influence.

[Omitting the first question.]

The second is the main question in the case. Was the appellant at the time of the execution of this deed in such relations with the said Mary A. as to give him undue influence over her; and if so, did he exert such influence in obtaining the deed from her?

As bearing on these questions, the following propositions are established by the evidence and pleadings. 1. That about the first of October, 1876, the appellant and said Mary A. had entered into a contract of marriage. 2. That the time for the consummation of that contract was agreed upon between them, and she made arrangements for the marriage, as so agreed, about the first of October, 1876; but for some reason the appellant did not offer and assent to the marriage at that time, but the contract of marriage was not abandoned by them, but continued. 3. That during this time the appellant solicited from her a conveyance of this land. Appellant says in his testimony that about six weeks before the marriage a contract was made between himself and said Mary A., that she should deed him this land in consideration that he should pay her debts and marry her.

It also appears that as early as about the first of October, and about the first time fixed for their marriage, said Mary A. became pregnant by the appellant. This conclusively appears from the testimony showing the time of the birth of the child. Whether he had seduced her, or their illicit intercourse had been brought about by equal mutual guilt, when her pregnancy was acknowledged and known to them both, he was in a position to almost compel her to yield to his demands as to her property. The more intelligent and capable she was, the more she would dread the exposure of the loss of her virtue, and be willing to make almost any sacrifice of her property to hide her shame. Exposure would not injure him so much as it would her; for though the law may hold the guilt of each party to such transactions equal, still the social fall and degradation of the woman is by far the most complete and most enduring, and the only escape for a woman under such circumstances from

overwhelming misfortune is to induce her paramour. It seems that said Mary A., stimulated by her great matter, was assiduous in urging the appellant to redeem. She seems to have followed him to his own home, and pressing him on that subject, when in the hearing of told her he would not marry her until she deeded him.

Under the condition in which the parties then were had no right to demand of said Mary A. the execution as an inducement for him to fulfill his promise of marriage to do it was a cruel wrong on his part, for he highest obligations of honor, and the dictates of redeem his promise without delay and without reward should be allowed to go unpunished who thus dishonored and then abandons her and his own offspring to the law as given to Moses, that where a man dishonors she should be his wife, and he should not put her to days; and though our laws do not compel the marriage obligation to perform it, when incurred, is no less than then. After her pregnancy became known to him his relations with said Mary A., and presumed influence was such that any disposition of her property to him legally subject to suspicion, and liable to be set aside by influence, unless he should show that the same was done or accomplished with the utmost fairness, and without The law seems to be well settled that when one assumes a confidential or fiduciary relation to another, as that of guardian, ward, attorney and client, and the like, where the donor is supposed to exercise an unusual and commanding influence over the grantor, courts will set aside the conveyance, unless he can show that the transaction was fair and without influence. It is laid down as a rule that the influence over a woman to whom he is engaged to be married should be so great that the court will look with great vigilance at the circumstances and situation of the parties, and will not set aside the influence which the intended husband, either by violence, may have used, but require satisfactory evidence that has not been used to sustain such a conveyance.

Eq. 119. The case now before the court is much different from one where there was simply a contract of marriage and a conveyance was made, and we think this deed ought to

We will now consider the terms on which the deed ought to be cancelled. It is a rule in equity that he who seeks relief in a court of equity must do equity. In order to arrive at a just conclusion as to the terms on which this conveyance should be cancelled, we shall have to consider the *statu quo* of the parties at the time when this conveyance was executed. If the conveyance had not been made, then on the marriage the appellant would have become a tenant by the curtesy in this land, if he survived his wife. He would also have forgiven her what she owed him at the time, and became liable for her debts that were pressed on him during the coverture, but not for those that were not so pressed, although he had received a fortune by his wife. Tyler on Infancy and Cov., § 334. So that if he had received an estate by curtesy in this land, the appellant was not liable for the debts of his wife *dum sola* which were not demanded of him during the coverture. And if he voluntarily paid them he could not charge them against the reversionary estate of her heir.

We will next consider the question whether appellant is, on cancellation of this deed, entitled to a tenancy by the curtesy in this land.

It is claimed by the respondent's counsel that as this deed was made at the time of the marriage, and was not void, but only voidable, the wife had no estate during her marriage with the appellant to which curtesy could attach. It is true that this deed was only voidable, but when by a decree it is cancelled, the original estate as between the parties is restored, and as between them the cancellation of the deed restores the estate subject to any equities between the parties which may be determined and settled by the decree. Had the deed been absolutely void, no equities could arise out of the transaction, or attach to the land from any act of the grantee while he held the title. While this marriage existed the appellant held the legal title, and his wife was possessed of an equity in it which entitled her to the legal title, and whatever estate he had in the land was in her right, and he is entitled to curtesy in the land, and that curtesy attaches to an equitable as well as a legal estate. 1 Bish. on Law of Married Women, § 505.

[Omitting minor matters.]

Decree affirmed.

ORTON V. ORTON.

(7 Or. 478.)

Mortgage — chattel — when void as to creditor

A mortgage of chattels is void as to creditors when it appears, it, or by extrinsic evidence, that the mortgagee gave the mortgagor power to dispose of the mortgaged property for his own use.

SUIT to foreclose a chattel mortgage. The opinion is based on the facts. The complainant had a decree below.

H. H. Gilfrey and Tilman Ford, for appellants.

Bonham & Ramsey, for respondent. Under the statute, had been no filing of the mortgage, or change of possession of the chattels, there being a sufficient consideration, the mortgage would depend entirely upon the intent with which it was executed; and if it was made in good faith, and without intent to defraud creditors, it must be held to be valid. *Floyd*, 4 Or. 101; 7 Bush, 29; 11 Metc. 333; 2 Cush. 646; 34 Md. 455; 121 Mass. 408; *People v. Bristol*, 42 Me. 139; *Hughes v. Cory*, 20 Iowa, 399.

In this case it is admitted that the mortgage was made on the day of its execution, and filing being a substitute for possession, and a continued change of possession, there is no ground whatever against the validity of the instrument. That it is that it is not fraudulent. 6 Or. 362.

BOISE, J. So far as the overruling of the demurrer to the complaint is concerned, as the appellants have not insisted on any ground of error, we will consider it as waived by them. The mortgage is admitted to be sufficient in form and properly executed, and we give it validity, unless it was fraudulent in its inception. It is not void by the subsequent acts of the parties to it. The testimony of both the mortgagor and mortgagee shows that the mortgage was executed to secure the payment of a note for \$2,152, which note was made in lieu of a former note and interest, made February 2, 1878. The consideration

* See *Cline v. Libby* (46 Wia. 128), 28 Am. Rep. 700.

\$2,000 note was the sum of \$900, loaned at that date by Iri Orton to his son, M. W. Orton, and his signing as surety for his son a note to Ried and Cox for \$1,100. If this testimony of the Ortons is true, then we think there was a valuable consideration for the note and mortgage. Their testimony, though questioned by the appellants, is not contradicted in this regard. But conceding that the mortgage was valid in its inception, the other question and the main question in this case is, did the subsequent conduct of the parties to this mortgage render it void as to the attaching creditors, L. Goldsmith & Co. ?

The evidence proves that after the execution of the first mortgage, Iri Orton permitted his son, M. W. Orton, the mortgagor, to continue to sell the mortgaged goods, which was a stock of merchandise, and apply the proceeds to his own use. And it seems from the evidence that it was the intention of said Iri, at the time he took this mortgage, to permit his son to use the goods in the same manner as he had used them before the mortgage was given, and that this same understanding continued after the second mortgage (the one sued on) was given, and up to the time that the goods were attached by L. Goldsmith & Co. The respondent testifies that he knew the store was kept open and the goods were being sold by his son the same as before the mortgage was given, and when being examined as a witness he was asked this question: "It was your calculation that he (M. W. Orton) should just go along, and if every thing went smooth, that he should sell goods and get other goods, and go ahead?" To which he answered: "Yes, sir; that was the idea." And again he was asked: "And you expected him to do that, didn't you?" Answer: "I didn't know when I might close him right out; I didn't know when. If he could have done well, I should not have closed him out." He was then asked what he meant by doing well; to which he answered: "If he could have sold a good deal of goods and got money to keep him from going under." It is true that the respondent claims that his son was not to so far diminish the stock of goods as to render it insufficient to the ample security of the note. But there was an unlimited right to dispose of the goods, and if the entire stock had been sold by M. W. Orton, prior to the commencement of this suit, the respondent could not, under the state of facts developed in this case, have maintained replevin or trover against the purchasers for the goods so sold. That is, no lien attached to the

goods that could have been enforced against the purchaser in good faith. Where there is no lien there is no the lien which attaches to the property mortgage the essence of the mortgage. We think that where it is on the face of the mortgage or by parol evidence that the mortgagor has given to the mortgagee the power to dispose of the property mortgaged, for the mortgagor, the mortgage is void as to purchasers and creditors of the mortgagor.

It was claimed by the respondent's counsel in this case that this mortgage is aided by the statute of this State, chapter 262, which provides that every sale of personal property by way of mortgage or security, or upon any other whatever, unless the same be accompanied by an instrument in writing and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditor or assignee, during his possession, disputable only by evidence to appear on the part of the person claiming under the assignment, that the same was made in good faith for full consideration, and without intent to defraud creditors. This presumption herein specified does not exist in the case before us, duly filed or recorded as provided by law.

This statute does not in any way reach or provide for a mortgage before the court. This mortgage is regular in form and duly recorded. The presumption raised by the statute is rebutted as to mortgages that have not been recorded. The statute is silent as to the effect of a provision in the mortgage of an agreement between the mortgagor and mortgagee that the mortgagor may sell the mortgaged property; and when it comes to appear, as in this case, then it becomes the question for the court to determine what shall be the legal effect of such an agreement as affecting the creditors of the mortgagor.

This question has been the subject of much discussion in the courts, and there is some apparent diversity in the authorities. We think the weight of authority as well as reason supports the rule before indicated, that where there is no power given to the mortgagor by the mortgagee to dispose of the mortgaged property which still remains in his possession, the mortgage is void as against the attaching creditors of the mortgagor.

In this case it was the manifest intention of Iri Orton to have M. W. Orton continue the business in his store, and sell the goods in the same manner as before the mortgage was given. This power to sell and continue the business as before enabled M. W. Orton to appear as the unembarrassed owner of the goods, and enabled him to obtain credit which would have been denied him had the right to sell the goods been denied. As the power to sell was unlimited, there was no security retained in the goods to Iri Orton; for he abandoned his lien by his mortgage when he granted the power to his son to do with the goods the same as he had been doing. Such an agreement was utterly inconsistent with his claim under the mortgage, and annulled its provisions. The views we have taken harmonize with the English common-law doctrine, and the rule as established in the Federal courts, and many of the State courts. 1 Smith's Lead. Cas. 52 (7th Am. ed.); 22 Wall. 513; 16 Ohio, 547. We think the decree of the Circuit Court should be reversed, and the respondent's bill dismissed.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

PHILADELPHIA AND READING RAILROAD CO.

(89 Penn. St. 81.)

Ships and shipping — Federal navigation laws —

A steamer is not bound to change her course for a row-boat, navigation laws, and in case of collision it is error to charge committing the injury is only excused by such inevitable foresight under the circumstances could not have prevented.

ACTION of damages for injury by collision between a steamer and a row-boat. The opinion states the case had a verdict.

Thomas Hart, Jr., for plaintiff in error.

James D. Lee and *Pierce Archer, Jr.*, for defendant. Steamboats having means to avoid injury which others do not possess, the law exacts of them exertions proportionate to their powers. *Holmes v. Watson*, 5 Cas. 457; *Tug Saenger v. Tug*, 10 Reg. 337.

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WOODWARD, J. A collision occurred on the afternoon of the 8d of July, 1876, between the steam collier "Leopard," belonging to the defendants below, and a row-boat in which there were four young men, of whom Frank Adams, the son of the plaintiff below, was one. The steamer was going down the Delaware river, on an ebb tide, at a rate of speed variously stated as from eight to twelve miles an hour. The boat was near the middle of the river, between the city of Philadelphia and the New Jersey shore, when the steamer approached it. Two of the men in it, one after the other, went into the water to swim. John Trapp was swimming when the steamer was first seen. From this point the testimony was conflicting. That of the plaintiff was to the effect that when the steamer was within fifty or sixty yards of the boat the men in it tried to get away, but could not do so on account of the tide. That of the defendants tended to show that no effort at all was made to move from the channel in which the steamer was coming down. It would seem that the boat was managed with difficulty, and that there was a deficiency of oars. As the steamer reached or was about to reach them, the men jumped into the water, and Adams and Casper Werner were drowned. There was testimony that the boat was abandoned at the instant of the collision, and there was testimony that it was abandoned when the steamer was ten or fifteen feet distant. This suit was brought by the plaintiff to recover damages for the injury caused her by the death of her son. The exigencies of this judgment do not require that the facts developed should be analyzed, or even detailed. The discussion will be confined to what appear to be the vital legal points raised on the trial and argued here.

In the second point of the counsel for the defendants, the court were asked to charge: "If the jury believe that when the boat in which the men were was first seen to be in the steamer's way, the captain of the steamer whistled and changed his helm, and successively stopped and reversed his engine, this was all he was bound to do, or could do, to avoid collision, and although the steamer, whether from her momentum or from the tide, may not have been able to stop still before reaching the boat, the defendants' servants were not for that reason negligent, and the verdict should be for the defendants." The point was peremptorily refused. It was defective, perhaps, in the absence of a single qualification. The plaintiff had alleged in part of her case that the captain had not kept an ade-

quate lookout. In connection with the answer to necessary to examine the grounds of other errors of the defendants. The jury were instructed in the answer to the plaintiff's tenth point, that "if the steam vessel had a man at the wheel, they were bound to have a lookout in their path, and if they did see it and con- course without changing or stopping the vessel, it was negligence on their part," subject to the qualification, in the language of the court, should "find the fault contributed to the accident."

In answering the plaintiff's twelfth point the court said "if the steamer did see, or ought to have seen the row-boat in time to avoid the collision, and did not avoid it, she was negligent," and the verdict should be for the plaintiff. In the thirteenth point, that "if the steam vessel did see, or could have seen the row-boat a square off, and if the distance was sufficient to allow her to change her course, or stop to avoid collision, she was bound to do so, and failing to do so, she was guilty of negligence;" and the fourteenth point, that "if the steamer, to stop the row-boat, if not made soon enough to be effective, she saw or ought to have seen the row-boat, will not be held negligent," were also affirmed. The errors in which are specified present the most prominent question to be decided. The fifteenth assignment alleges error in the refusal to affirm the sixth point of the defendants, "that it was the duty of those in charge of the row-boat to keep out of the steam channel, and as the evidence showed "they did not do so, they were negligent and not recover." The point assumed the ability of the row-boat to move. The plaintiff alleged that the men were unable to get out of the channel; that the captain of the steamer should have regarded this inability; and that it was for the jury to decide whether the boat could have been moved or not.

Were the men in the boat within the protection of the "Steam and Sailing Rules" embodied in the navigation laws of the United States? That as between a steamer and a sailing vessel the steamer shall give way and the sailing vessel shall keep its course, and as between sailing vessels, one that is going free shall give way to one that is close-hauled, are regulations corresponding to the settled regulations for the use of public highway. But does a steamer owe any such duty to a row-boat?

equipped and manned, such a boat is moved with greater facility and is more within the control of the crew than the steamer itself. The collier of the defendants was in the channel of the Delaware for the purposes and in the prosecution of a lawful business, and had the right, in absence of conditions creating duties to others, to maintain its course. Ordinarily, the crew of a row-boat can remove it from the track of danger by a movement or two of its oars, and in scarcely an appreciable interval of time. The captain of a steamer passing down the channel would have the right to assume that the boat would be equipped in the usual way, and that the ordinary precautions would be taken and the ordinary movements made. A crippled condition of the boat, inadequate appliances, or the inability of the crew to escape collision, shown to have been known or apparent to the captain, would change his relations and responsibilities at once. But is it possible that the bare fact that the boat was in the channel required that the course of the steamer should be altered or its speed checked before it became manifest that the danger of collision was impending? Principles have long been settled which are inconsistent with those under which this cause was tried. It was declared in *Cobb v. Bennett*, 25 P. F. Smith, 326, that a vessel may hold her course in a navigable stream without regard to a fisherman's net, if the master acts without wantonness or malice; and that while the right of fishery is acknowledged, it is subordinate to the right of navigation. In *Beach v. Parmeter*, 11 Harris, 196, damages were claimed for injury to the leg of a horse produced by collision with a buggy which, in passing the horse, kept its course in the beaten track of the highway. It was said in the opinion here that "where a road is narrow, and there is difficulty in passing, if a horseman can turn out without danger to himself or beast, and the buggy cannot be turned without incurring danger, it is the duty of the former to give way." And in *Grier v. Sampson*, 3 Casey, 183, it was held that while it is the general custom in this country for persons meeting on a highway to pass to the right, yet when a horseman or the driver of a light carriage meets a heavily laden team it is his duty to give way and leave the choice of the road to the more unwieldy vehicle. The cases of the *Scotia*, 14 Wall. 170, and of the *Free State*, 1 Otto, 200, decided that it is the duty of a steamer to keep out of the way of a sailing vessel; that this duty implies a correlative obligation on the part of the sailing vessel to keep her course, and

to do nothing to mislead ; that the steamer is required to take precautions when there is no apparent danger ; and that a steam vessel is approaching another vessel, and a collision might be produced by a departure of the latter from its navigation, the former vessel is not bound to slacken its speed to stop and reverse. Up to the moment when the " Leopard " had reasonable ground to apprehend a collision, it was not bound to change his course or to take other precautions to protect the boat from a danger which it must have been practicable for the crew to avert.

In the fourth assignment of error complaint is made of the plaintiff's sixth point, " that the accident was an excuse for the party who committed the injury must be an accident, as human foresight, under the circumstances, might have prevented." Just how deeply into the minds of the jury an instruction might have struck can only be conjectured from an unfortunate use of terms, although their misleadings may have been modified by the qualifying phrase " under the circumstances." The jury would have been warranted in returning a verdict for the defendants, if they had found that the accident had occurred notwithstanding the careful, prudent use of all needed appliances by competent, earnest officers. To hold one whose act has injured another when the " accident " was one which the keenest human foresight could not anticipate, would be to carry the law of negligence beyond the rule which demands due skill, prudence and diligence proportioned to the requirements of a particular case. In *Beach v. Parmeter, supra*, the president of the court had charged that the defendant was not liable " if the accident was entirely accidental," and if the injury was " the result of an inevitable accident." It was said here, in affirming the judgment, " must have meant inevitable accident, such as no human foresight could avert." Applied as the words were in that case, they could perhaps neither help nor hurt. But in the present case, believed that as a formula for the instruction of a jury, it would prove to be always unsafe.

In the plaintiff's twentieth point, the measure of damages was defined with accuracy, and the point was affirmed. On the general charge, the subject was referred to the jury in a proper and possible way. The court said : " It would be impos-

rule or standard by which damages of this kind could be estimated. They depend upon conditions of life * * * of which the jury will know about as perfectly, * * * no doubt as any lawgiver, or any one whose duty it is to instruct the jury on the purposes of the law. Whatever it may be, it should be governed by a disposition * * * to arrive, if possible, at a fair compensation, and to do right between these parties, just as each of us would expect under like circumstances, if our cause should be viewed and judged by a jury." This could only have been received as an intimation that the damages were to be assessed without the application of any rule of law whatever. In the *Pennsylvania Railroad Co. v. Ogier*, 11 Casey, 60, the question of damages was submitted to the "fair and reasonable discretion" of the jury, "based upon the law and the evidence." Latitude at least as great, was given here, as was given either in *Railroad Co. v. Kelly*, 7 Casey, 372, or in *Railroad v. Books*, 7 P. F. Smith, 339, in both of which cases the judgments were reversed for errors in unguarded instructions relating to assessments of damages.

Without detailed reference to the fifteen assignments of error, what has been said covers the essential points of controversy in this cause, which are believed to have been improvidently determined.

Judgment reversed, and *venire facias de novo* awarded.

Judgment reversed.

PHILADELPHIA AND READING RAILROAD CO. v. ERVIN.

(90 Penn. St. 71.)

Negligence — ordinance — evidence.

A municipal ordinance required owners of wharves to maintain cap-logs. Owing to the absence of a cap log on the defendant's wharf the plaintiff, acquainted with the premises, sustained injury. Evidence was offered by the defendant to show that cap-logs would have interfered with the loading of vessels in the course of their business. This was rejected. *Held* error. Also *held*, that no liability was raised by the mere non-compliance with the ordinance.

ACTION of negligence. The plaintiff, driving a coal cart in the pursuit of his business of selling the defendants' coal,

drove on their wharf, and his horse backing, plained cause, it fell into the water, owing to the log, and was drowned. The *narr.* contained the first alleged the erection and subsequent removal without notice to the plaintiff; the second alleged defendant under an ordinance to maintain a cap-log, alleged neglect to maintain the wharf safe and i Plea, not guilty. The plaintiff had a verdict.

The second assignment of error was the admission of an ordinance of councils of the city of Philadelphia 1857, which made the following provisions: "The duty of every owner, or agent of such owner, of a wharf on the river Delaware or the river Schuylkill, within the city of Philadelphia, to place, or cause to be placed, on every side of the wharf which shall be next the river or dock, a cap-log, at least eight inches in height from the level of such wharf, so as to be lopped or pierced on the lower side thereof so as to run off from the wharf.

"That if any owner or agent shall refuse or neglect to place such cap-log as aforesaid, * * * after notice to such owner or agent, or they shall forfeit or pay the sum of \$50, to be recovered of like amount are by law recoverable."

The third assignment was the refusal of the defendants to prove the nature of the business carried on at the wharf, and that placing cap-logs thereon would interfere with the loading of vessels.

The court charged, "It is a question for you, gentlemen, under the circumstances, whether the plaintiff in any manner contributed to this accident. It is for you to determine whether the place where he took the horse was dangerous, and whether his negligence to take it there."

Thomas Hart, Jr., for plaintiff in error.

Henry Reed and William W. Wiltbank, for defendant. Where a statute gives a right not theretofore existing, and the case in all the authorities cited by plaintiff in error is given by the statute is exclusive; but where a statute prohibits that which the common law had already prohibited, the statutory remedy is an additional

Hibbard, 20 Johns. 292 ; 11 Am. Dec. 284 ; *Lane v. Satter*, 51 N. Y. 7 ; *Richardson v. McDougall*, 11 Wend. 47 ; *Porter v. Mount*, 41 Barb. 564 ; *Dyert v. Schenck*, 23 Wend. 451. See *Washington Road v. State*, 19 Md. 287 ; *Litchfield v. Simpson*, 8 Q. B. 74 ; *Collinson v. Newcastle Railway Co.*, 1 C. & K. 546.

The defendant was guilty of negligence in not having cap-logs on its wharf. *Brown v. Lynn*, 7 Casey, 510 ; *Swords v. Edgar*, 59 N. Y. 81 ; s. c., 17 Am. Rep. 295 ; *Holmes v. N. E. Railway Co.*, L. R., 4 Exch. 257 ; *White v. France*, L. R., 2 C. P. Div. 310 ; *Tobin v. Portland Railroad Co.*, 59 Me. 183 ; s. c., 8 Am. Rep. 415 ; *Freer v. Cameron*, 4 Rich. 229 ; *Wendell v. Baxter*, 12 Gray, 496 ; *Carlton v. Franconia Co.*, 99 Mass. 216.

GORDON, J. In the determination of this case it is of no kind of consequence whether the wharf of the defendant below was a public or private one, since the plaintiff was there not as a trespasser nor by mere license, but upon not only his own business but also that of the company. It was engaged in the transportation and sale of coal, and he was engaged in delivering it to the company's customers, so that whilst he was not employed directly by the defendant, yet, it profited by his employment. The company then in this manner inviting and making it necessary for carters to come upon its premises, was bound to provide ways for horses and vehicles which were reasonably safe. It was however not bound to do more than this; if such ways were reasonably safe; if an ordinarily prudent man could drive along them without danger, the obligation of the defendant was fully discharged; it was not liable for extraordinary accidents, neither was it liable for results arising from a want of judgment or prudence on the part of the plaintiff. Was the place where the plaintiff's carts stood unsafe? Then the question at once arises, why did he stand them there? He himself says he stopped where he did, in order to ascertain whether the coal he wanted was or was not on pier No. 11. For a purpose of this kind, it is clear if there was a safer place in the yard he might have taken it; nay, for that matter, he need not have entered the yard at all until he had discovered just where his coal was. If there was a safer place, which was reasonably convenient, where he might have stationed his horses and carts, he ought to have selected such place; for he cannot call upon the company to protect him from accidents, from which he might have protected himself

by a proper exercise of his own judgment. He knew the nature of the wharves; he knew the nature of his own horses, quite as well as the company, and if under such circumstances he was to select a place safe beyond peradventure for his own horses, it was the company bound to cap their wharves in an anticipation of the mulishness of his horses or of his own want of judgment.

Substantially, the charge of the learned judge on this part of the case was correct. But as the question of this question of negligence must depend on the circumstances, we think the evidence offered to prove the character of the company's business ought to have been taken into consideration. If cap-logs would have been an obstruction to the business, it would show, at least, that they had not been omitted from carelessness or from a niggardly spirit of economy. If the defendant would have a better standing with the jury, it would show that the company was negligent in the payment of damages. On the other hand, it was proper to show that persons acquainted with the place, that it was dangerous, was obviously dangerous, an inference of the company's negligence of that fact must be presumed.

We turn now to the second specification of error. We are induced to consider it more because of our desire to remove all doubt upon the retrial than because of any error in the first trial. That assignment embraces the defendant's objection to the introduction in evidence of the city ordinance requiring the wharves on the Schuylkill and Delaware rivers to be capped with cap-logs upon them of a height not less than eight feet. The plaintiff, in one of the counts of his *narr.*, declared that the ordinance was a nuisance as raising a duty which the defendant was bound to perform, and laid the damages resulting from the loss of his horses as a consequence of the neglect of such duty. This count would not have stood the test of a demurrer; or had the court been allowed to charge that upon this count the plaintiff could not recover, it would also that upon the remaining counts the ordinance could be regarded as evidence, it would have been bound so to do.

For let us suppose that these wharves were so constructed as to be *extra* the ordinance, no charge of negligence could be made, and no common-law action would lie, would disobedience of the ordinance of itself subject the company to such charges? This question would seem almost to answer itself.

affirmed, then may civil duties and civil remedies be given or taken away by ordinances, a power as yet quite beyond the reach of municipal legislation.

The National or State legislature may do this, for it is the supreme power, and as such can make that immoral which was before indifferent, and that neglect which was before prudence, but the city of Philadelphia has no such power. Its ordinances are but police regulations, enforceable by penalties, recoverable by actions of debt or otherwise, as may be prescribed, but if not so enforced they come to nothing. An ordinance may forbid the maintenance by my neighbor of a cess-pool upon his premises, and it may, by penalty, compel him to abate it, but whether it does so or not, I may, if I am damaged thereby, have my common-law action against him, but if I am not damaged I am without remedy; in this the ordinance neither helps nor hinders. 'This matter is well stated by SPENCER, J., in the case of *Vandyke v. City of Cincinnati*, Dis. 532, thus: "I conclude, then, that the ordinance imposed upon Harrison a public duty alone, which can only be enforced by the penalty prescribed, and non-performance of which does not subject him to a civil action at the suit of a person injured." In arriving at this conclusion the learned justice uses the argument I have thought proper to adopt; that is, an ordinance cannot create a civil duty enforceable at common law. For if a city council has power so to do — if it has the power to create such obligation it must also have the power to restrict it, in other words, to prescribe the sole consequences arising therefrom, but it will, we apprehend, be conceded that a power like the one here indicated is wholly beyond the province of such a body.

There are indeed cases where such ordinances have been received in evidence in common-law actions for negligence, but they are generally such as enter into the case itself or enforce a common-law duty. Such are ordinances regulating the speed of railroad trains when passing through towns or cities. Here the ordinance may, and usually does, enter into the question of negligence, for the rate of speed to be anticipated has much to do with the care to be exercised by those crossing the tracks. So, on the other hand, those in charge of trains are not only subject to the common-law duty of passing through towns slowly and cautiously, but they must know that persons depending upon the observance of the municipal regulations will not take all that care which would be required

in the open country. The case in hand, however, duties. Whether the defendant should or should not logs upon its wharves was a matter which addressed the judgment of those having its affairs in hand. The omission did not *per se* involve the company in any responsibility of the ordinance. Neither could the plaintiff have any dependence upon the observance of such ordinance that if it applied at all to the defendant's wharves observed; he knew that he must depend for the protection of his property upon his own care and skill, and these facts gave him his common-law remedy for compensation.

Under the pleadings, however, the ordinance was admitted, for the plaintiff having declared upon it, and having permitted the case to go to trial without any other traverse than that involved in the plea of not guilty, the plaintiff, had a right to introduce this evidence and to let the judgment of the court thereon. It follows that the judgment was reversed only for the error, already adverted to, in admitting in overruling the defendant's offer of evidence in the third specification.

Judgment reversed and a new trial granted.

AUDENREID'S APPEAL.

(89 Penn. St. 114.)

Fraud — constructive — physician and patient.

A. was seventy years old, very wealthy, infirm and confined to his bed. F. was his physician and A. executed a contract with F., by which, in consideration of F.'s services in securing certain stock for A., A. agreed to give an interest in the stock to F. F. received thereby about \$50,000. His executors brought suit to set aside the transaction. The court gave liberty to show that the transaction was a gift; that A. was prohibited from receiving a gift from his patient by reason of his infirmity and that the burden of proof of fairness is not on the defendant. (p. 736.)

BILL in equity by the executors of Audenreid and Dr. Forbes, charging a conspiracy to defraud.

and to set aside certain contracts. The court below said in its opinion :

"The conspiracy is alleged to consist of a combination or agreement on the part of Walker and Forbes to induce Audenreid to subscribe for \$250,000 of the capital stock of a company, organized with a capital of \$10,000,000, for the construction of a railway from the Mississippi to the Pacific ocean. This conspiracy is charged to have been founded in fraud, and to have been carried into effect by misrepresentation of material statements made to Audenreid, and by concealing from him material facts which in good faith they ought to have disclosed. Forbes was the medical attendant of Audenreid, and Walker was at the time vice-president of the Shenandoah Valley railroad.

"Mr. Audenreid was about seventy years old, quite infirm in health, and during the greater part of the time confined to his house. It is further asserted by plaintiffs, that taking advantage of his condition, defendants, under false pretenses, sought to obtain from him large interests in the property thus acquired. That Forbes introduced Walker to Audenreid, and that they induced him to believe that Walker was the owner of one of the shares, and that no other share could be got at all, or at least, not on as favorable terms as were offered by Walker, and that the stock would rise rapidly and greatly in value.

"Agreements in writing were executed by the said parties to carry these several schemes into effect, and Audenreid, on the 2d of November, 1872, made his subscription for himself and Walker upon the books of the company. The agreement with Walker is dated October 25, 1872, whereby he transferred to Audenreid four-fifths of one undivided fortieth of the whole capital of said construction company, which he, Walker, 'hath heretofore secured for himself, his heirs and assigns.'

"The agreement between Audenreid and Forbes bears date October 26, 1872, and recites that for the consideration that Forbes had secured to Audenreid an interest in the capital stock of the California and Texas Pacific Railway Company, under the contract between Walker and Audenreid, which was negotiated and secured through the agency and intervention of Forbes, and the further consideration of \$1, Audenreid agreed to transfer to Forbes one-fourth of his interest in the stock of the company, and to deliver to him one-fourth of all stock, bonds, property and funds which he

should receive from said company, and pay for calls on his entire four-fifths interest.

“Audenreid received from the construction corporation and sixty-two land grant bonds for \$1,000 plaintiffs state that Walker demanded and received on the 17th of July, 1873, and that on the same day thirty of said bonds.

“The relief which plaintiffs ask is, that the co-defendants Walker and Forbes and Audenreid shall be declared liable on the part of Walker and Forbes, and that they be compelled to retain or to receive any profits under the said bonds.

“The defendants have made separate answers, in which they deny, in the most positive terms, the charges of fraudulent combination. These denials are made by each defendant for himself individually, and for his co-defendants in particular, where confederation and agreement is charged, and cover alike the assertions of misrepresentation and concealment of material facts touching the transaction.

“Several of the English authorities, and among them of *Gibson v. Russell*, 2 Y. & C. 104, were cited in support of the claim that in a case like the present one, the burden of proof is thrown upon the defendants. *Gibson v. Russell* is in many respects like the one now before us. A deed of gift of real estate by an aged and infirm person to his intimate friend and confidant was set aside for fraud, one of the circumstances of fraud being that the deed stated, contrary to the truth, that consideration was paid. It was admitted, upon the hearing of the case, that although the deed recited a consideration of 1,000*l*. paid by the grantee for the property, but that the grantor had furnished 1,000*l*. of his own money to support a colorable consideration. In that case, however, the fact appeared that the grantor had been under insane delusions; this, in the opinion of the chancellor, shifted the burden of proof, and required the defendant to establish first, that when Gibson executed the deed he was of sound mind; secondly, that he was at that time capable of transacting such business; and thirdly, that he well understood the whole business, and needed no other advice respecting it than as he had.

“The vice-chancellor found, as to each of these points, that the defendant had not established them by his proof.

reason, and upon other considerations mentioned in his opinion, he set the deed aside.

"This case, though strongly analogous to the present one in several of its most prominent facts, yet differs from it in the one which is most essential, and upon this distinction the decision of the vice-chancellor is mainly founded. Although it was shown that Mr. Audenreid had greatly failed in bodily health, and a number of witnesses testified that his mind was considerably impaired, the value of this testimony is greatly shaken by the fact, that these witnesses did not hesitate to advise and consult him upon business matters, but transacted important business with and for him during all the time covered by their testimony. The great preponderance of the testimony on this point establishes the fact that his mental faculties were in no appreciable degree impaired. The testimony also shows that Mr. Audenreid was possessed of a great business capacity; he was shrewd and keen at a bargain, and had a clearness of mental vision in all matters relating to business much above the average.

"The burden of proof in this case is not shifted upon the defendants; for here the denial is most positive; and it is, as a general rule, only where the answer of the defendant is not responsive to the bill, but sets up affirmations in opposition to, or in avoidance of the plaintiff's demand, and is replied to by the plaintiff, that the answer is of no avail in respect to such allegations. In such a case the defendant is as much bound to support his affirmative averments by independent testimony, as the plaintiff is to sustain his bill. Daniel's Ch. 984, note.

"Mr. Bull testifies that the consideration he inserted in the agreement was not inserted in consequence of any instruction he received from Dr. Forbes, or any one else; that the paper was intended to secure to the doctor an interest of \$50,000, which he obtained as a gift, and as he knew that no present interest was to pass to the doctor, and that unless the contract had some consideration to support it, it was subject to revocation, for greater caution he inserted the consideration recited in the agreement; that it was wholly upon his advice and at his suggestion that this was done. All this the answer asserts was explained to Mr. Audenreid, and that it was after explanation that he approved of and signed the contract. This, we think, ought not to be questioned, in view of the fact that in July following, eight months after the date of the

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agreement, he delivered to Mr. Forbes, by the confidential clerk, Mr. Robb, one of the plaintiffs, thirty having also, in May preceding, transferred in trust construction bonds, the interest and principal being to the direction of Dr. Forbes, for hospital purposes. The reasonable explanation of the generosity of Audenreid and his desire to benefit Dr. Forbes is, that he was under great obligation to him for important professional services which the doctor had rendered to him, and who also bore a personal relation to him of a personal friend. This is to be taken in connection with the fact, that Mr. Audenreid was a man of very large wealth, to whom a gift large in amount would bring no sensible diminution of fortune, and it is in the mind that he expected to pay it out of the profits anticipated he would realize upon his investment in the construction company. The expectation of the success of the enterprise, and of the subscribers, was that it would double its original value in a short time.

"Nor can we agree with the plaintiffs that there is anything in the confidential relation of a medical adviser to a patient which forbids the acceptance of a gift by him from his patient. *Field's Estate*, 12 Har. 232, decides that there is no principle of morals which prevents a minister of the gospel from accepting gifts, large or small, from his parishioners or from his friends. In that case, Mrs. Greenfield, who was old and infirm, gave to Rev. William Suddards a sealed note for \$6,000 for "funeral expenses and for his services;" the services were of a spiritual nature, visits made at the request of Mrs. Greenfield to persons and places of her care and solicitude. This case rules against the plaintiffs; the relation of a spiritual adviser to a patient being closer, more confidential, and more influential than the action of an aged and infirm person than that of a medical attendant. *Greenfield's Estate* also supports the view that an inquiry may be made as to the consideration recited in the sealed instrument. The court hold, notwithstanding the consideration mentioned, and that the note was understood to import consideration, that it was to be regarded as such.

"Upon the whole case therefore as it stands, the law is applicable to and governing it, and upon the pleadings and proofs, we are required to dismiss the bill as to William

the costs as to him to be paid by the plaintiffs, and we so order."

A. Sydney Biddle and R. C. McMurtrie, for appellants.

The donee, where he stands in any confidential relation to the donor, must satisfy the court on a bill brought to set aside the gift, that the donor has had competent and independent advice in conferring the benefit, and that no undue influence has been practiced. The confidential relation then shifts the burden of proof. The rule is independent of age, sex, mental infirmity or other incapacity. *Rhodes v. Bate*, Law Rep. 1 Ch. App. 252; *Huguenin v. Basleoy*, *supra*; *Popham v. Brooks*, 5 Russ. 8; *Lyon v. Home*, Law Rep. 6 Eq. 655; *Greenfield's Estate*, 2 Harris, 489; *Wright v. Vanderplank*, 8 DeGex, M. & G. 187; *Taylor v. Taylor*, 8 How. 183; *Todd v. Grove*, 33 Md. 188; *Boney v. Hollingsworth*, 23 Ala. 698; *Cadwalader v. West*, 48 Mo. 483; *Crispell v. Dubois*, 4 Barb. 393; *Brice v. Brice*, 5 id. 533; *Wheeler v. Wheeler*, 43 Conn. 503; *Highberger v. Stigler*, 21 Md. 838; *Mack v. Perry*, 36 Misc. 244; *Lake v. Ranney*, 33 Barb. 68; *Bergen v. Udall*, 31 id. 9; *Garvin v. Williams*, 44 Mo. 465.

P. McCall, for appellee.

PER CURIAM. A careful examination of the proofs and consideration of the able arguments, oral and printed, of the learned and zealous counsel for the appellants have failed to convince us that there was any error in the decree appealed from. The opinion of the learned president of the court below so clearly expresses the views we entertain of the case that we deem it unnecessary to add any thing.

Decree affirmed, and appeal dismissed at the costs of the appellants.

Decree affirmed.

NOTE BY THE REPORTER.—So far as the burden of proof is concerned, we are inclined to believe this case is opposed to the almost unanimous current of authority. The following are the principal cases of gifts from patient to physician and contracts between them:

In *Dent v. Bennett*, 4 My. & Cr. 269, Lord Chancellor COTTENHAM said: "A medical attendant obtains from his patient, eighty-five years of age, an agreement to pay him £25,000 for services completed two years before, the regular charge for which had been previously paid; and this privately, without the intervention of any third person, and carefully concealed until after the death of the patient." "It was argued, upon the authority

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of the civil law, and some reported cases, that medical attendants of this kind, within that class of persons whose acts, when dealing with, be watched with great jealousy. Undoubtedly they are; but I will not take the risk of in any degree fettering the exercise of the beneficial jurisdiction. 'The relief,' as Sir S. ROMILLY says in his celebrated reply in *Hughes v. Hughes*, hearing which I received so much pleasure that recollection of it has not faded in the lapse of more than thirty years—'the relief stands upon a general principle, and applies to all the variety of relations in which dominion may be exercised by one person over another; and when I find an agreement, so extravagant in its provisions, made by a medical attendant from his patient of a very advanced age, and confirmed by his professional advisers and all other persons, and have it proved that the wishes and intentions of the testator were wholly inconsistent with those provisions, I come to the conclusion that the medical attendant did obtain it by undue influence exercised over his patient.' The court also held that the agreement was not binding, being payable at death, as it was an inducement to hasten the patient's death.

Doggett v. Lane, 12 Mo. 215, was a case of a sale by patient to physician, with no proof of inadequacy of price. The transaction was sustained.

Billage v. Southes, 9 Hare, 534, was the case of a poor patient, bequeathing to his physician a note for £325, an amount greatly in excess of the value, without the rendition of any account. The court restrained the executor from paying beyond the amount justly due for services, saying: "No part of the jurisdiction of the court is more useful than that which it exercises in watching and controlling the dealings between persons standing in a relation of confidence to each other; and a part of the jurisdiction of the court cannot be too freely applied, especially in cases between whom or the circumstances in which it is applied. The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no objection to its being applied, whatever may be the nature of the confidence reposed in the parties between whom it has subsisted. I take the principle to be the same in its application, and the cases in which the jurisdiction has been exercised, whether in the case of *cestui que trust*, guardian and ward, attorney and client, surgeon and patient, are merely instances of the application of the principle." "It is said to be liberal," "but intention imports knowledge, and liberality imports that the gift is not intended to be a gift, and I see no evidence in this case either of knowledge or of the absence of intention where a gift is set up between parties standing in a confidential relation. The burden of establishing it by proof rests upon the party who has received the gift."

In *Pratt v. Barker*, 1 Sim. 1, a case of physician and patient, the evidence showed the influence and absence of influence, and the transaction was sustained.

In *Popham v. Brooke*, 5 Russ. 8, a patient, suffering from apoplexy, and capable of talking only in monosyllables, executed to the surgeon of the ship on which he had been visiting, an instrument, giving him an annuity of £100 for his life, and that he would live with him and attend him professionally. The court remarked: "If it were admitted that Colonel Popham was of capacity to understand, the nature and effect of these instruments, they would be sustained by the defendant. On the 8th of July, the defendant was informed that Colonel Popham could not recover, nor survive long; and on the preceding day, the defendant stated to Mrs. Popham his own opinion that he could not survive more than a month or six weeks. When, therefore, the instruments were executed on the 12th of July, the defendant well knew that he was giving a large gratuity for no consideration for so large a gratuity; whereas Col. Popham gave them in the hope of a prolonged life. Under such circumstances it was the bounden duty of the defendant to have declined a compensation of £100. Col. Popham had pressed it on him, and had been in truth capable of understanding the nature and effect of the instruments."

In *Ashwell v. Lomi*, L. R., 3 P. & D. 477, it was held that although the law which forbids a man to bequeath his property to his medical attendant is a favorable circumstance for one in such a confidential position, with no laboring under a severe disease, to take a large benefit under such pa-

ticularly if it be executed in secrecy, and the whole transaction assumes the character of a clandestine proceeding, and in such a case the onus will lie very heavily upon the party benefitted to maintain the validity of the will.

In *Allen v. Davis*, 4 DeG. & S. 123, an aged gentleman had accepted a draft for some £300 in favor of a dentist, the latter averring that it was in consideration of an oral agreement, no third person being present, that he was to attend to the acceptor's teeth and supply him with artificial teeth during life. The acceptor dying before the maturity, Add, that the draft must be surrendered. The court said: "In a case of imputed fraud, the plaintiff is entitled to ask of the court, as a judge of fact, whether an inference of fraud — of gross fraud — arises from the case as Mr. Davis has himself stated it. And I think it quite impossible to ask any reasonable being to draw any different inference from such materials." Citing *Dent v. Bennett*.

Codrillader v. West, 41 Mo. 458, was the case of a patient, aged, feeble, deaf and of very weak mind, bestowing all his estate on his attending physician, who lived with him and had controlling influence over him, for an extremely trifling compensation. The transaction was set aside. The court said: "Owing to the relation which the parties sustained toward each other, the deed was presumptively the result of undue influence, and, therefore, *prima facie* void for that reason. It has been repeatedly declared by learned chancellors that the mere relation of patient and medical adviser was sufficient to avoid the contracts of the former made with the latter during the continuance of such relation." Citing *Dent v. Bennett*. The court then go on to say that this presumption is not repelled by the evidence, the substance of which is given above.

In *Crispell v. Dubois*, 4 Barb. 333, a will had been drawn by the testatrix's physician and confidential adviser, devising him a considerable amount. The court said he "stood in relation of special confidence to the testatrix, both as her medical attendant and confidential adviser," and that the onus of proof was on him as propounder of the will.

Story says (1 Eq. Jur., § 314): "Similar considerations" (i. e., as to the presumption of unfairness and the burden of proof) "apply to the case of a medical adviser and his patient. For it would be a meager sort of justice to say that the sort of policy which has induced the court to interfere between client and attorney, should be restricted to such cases; since as much mischief might be produced, and as much fraud and dishonesty be practiced, if transactions were permitted to stand which arose between parties in equally confidential relations."

In Hare and Wallace's note to *Hughes v. Bassley*, 3 White & Tudor's Lead. Cas. in Eq. 123, it is said: "A physician is within the circle of confidential relations while attending on his patients, and until the influence arising from this source has ceased to operate."

This question arose in a case at nisi prius in England, in August, 1880, before Mr. Justice Starnes, in *Mitchell v. Homfray*. This was an action, brought by the executors of the late Mrs. Gildard, to recover a sum of £200, alleged to have been advanced on loan by the old lady to Dr. Homfray, but which he claimed to have received as a gift. The judge, in summing up, said that if one person chose voluntarily to confer a benefit upon another, to give money (or other things) without fraud, or any undue pressure or solicitation, or without intention to defraud creditors, and if he has a perfectly good title, the property in the money (or goods) is as absolutely transferred as that in goods sold and delivered. Upon this principle a broad and important exception had been grafted by the Court of Chancery. There are certain relations of life in which one person obtains so much influence over another by reason of the relationship which exists between them that the former can hardly avoid being more or less under temptation. The relationship, for instance, between priest and penitent is of so delicate a nature, and so liable to abuse, that any advice given by priest to penitent is regarded with a jealous eye and guarded by strict rules. The same may be said of the relationship existing between client and legal adviser, and between a patient and the medical man who attends him. With regard to this latter relationship, which was the important one in the present case, his lordship said he should follow the line laid down by Lord Justice Turner in the case of *Rhodes v. Bate*, 35 L. J. Rep. Chan. 281, and should tell the jury that the law was that if a gift be made by a patient to a medical man during the existence of the relationship, the gift would be set aside, unless at the time when the gift was made, the patient had competent and independent advice with regard to the giving of it.

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In *Jackson v. Ashton*, 11 Pet. 255, cited by counsel for the appellee the court said: "We now come to consider the fourth ground taken which is, that from the relation which existed between the defendant and she could make no valid contract with him. He was her pastor and before the mortgage deed was signed, Mrs. Goodwin did belong to the charge of the defendant; but this relation had ceased long before; but if this relation existed in fact, it is not charged in the bill. Does a clergyman subject him to suspicions which do not attach to others? Is he presumed to be dishonest? It will indeed exhibit a most singular case should by its decision fix this stain upon the character of a class of men respected for the purity of their lives, and their active agency in the community. They are influential, it is true, but their influence depends upon the faith which their sacred duties are performed. Acquainted as we are with human nature, we cannot expect to find any class of men exempt from temptation. But why should the ministers of the gospel, who as a class are more virtuous than any other, be unable to make a contract with those who love them most? Their influence, by precept and example, does more to restrain the actions of men, and restrain their vicious inclinations, than all the laws of the land. And yet we are called upon to denounce this whole class, and hold them incapable of making a contract with those who are under their pastoral charge, and who, we are told, are distinguished for their piety." These remarks, it will be seen, are in relation to a case was of contract, and not of gift.

The case of *Greenleaf's Estate*, 12 Harris, 232, cited by counsel, and relied on by the court in the principal case, has no application. The learned judge of the Common Pleas, to whom the case was referred (and undoubtedly it was) to Mr. Sudards is prohibited by law, as again we know of no rule of law or morals which will prevent clergymen from making a contract with a large or small, even from their parishioners, which it seems was not the case in this field, as she did not belong to the immediate church or congregation of this country the danger is that clergymen will receive too little rather than too much.

In *Norton v. Rely*, 2 Eden, 286, a grant of an annuity, obtained by having a spiritual ascendancy over a woman under a state of religious delusion, was set aside on principles of public policy. The report does not show what the Chancellor HENLEY delivered a very severe and at the same time accurate opinion. He makes very different presumptions as to the clergy from those in the case of *Norton v. Rely*.

We are quite inclined to believe, from the foregoing array, that in a confidential relation, like that of physician and patient, the donor, in making a gift, on a bill brought to set aside the gift, that the donor had competent advice in conferring the benefit, that he fully understood the nature of the transaction, and that no undue influence was practiced, and that this rule is not affected by sex, mental infirmity, and other incapacity.

As to the application of the doctrine of constructive fraud as between a donor and a donee, see *Berkmeyer v. Klierman*, 33 Ohio St. 239; s. c., 18 Ohio St. 498; husband and wife, *Boyd v. De LaMontagne*, 73 N. Y. 498; s. c., 29 Albany Law J. 498; *Ashton's Appeal*, 86 Penn. St. 512; s. c., 27 Am. Rep. 726; parent and child, *40 Mich. 473*; s. c., 29 Am. Rep. 547; affianced parties, *Pierce v. Pierce*, 27 Am. Rep. 22; and note, 26; *Gilmore v. Burch*, ante, 710; guardian and ward, *son v. Lowery*, 54 Ala. 510; s. c., 25 Am. Rep. 718, and note, 728; grantor and grantee, *Cowes v. Cornell*, 75 N. Y. 91; s. c., 31 Am. Rep. 428; attorney and client, *Bradford*, 59 Ala. 581; s. c., 31 Am. Rep. 23.

SPARK'S APPEAL.

(89 Penn. St. 148.)

Will — devise and bequest — manufactory and “personal property therein and thereto belonging.”

A testator provided as follows: “I hereby give, devise and bequeath to my son B. and to his heirs and assigns forever, upon his attaining the age of twenty-one years, all my Shot Tower property, consisting of Shot Tower, buildings and lots of ground connected therewith * * * with all the appurtenances, machinery, fixtures and personal property therein and thereto belonging.” At the testator's death there was in the Shot Tower a large quantity of manufactured shot and of unmanufactured material. It was apparent from the will that the testator intended that his son should carry on the business on coming of age. *Held*, that the son was entitled to the unmanufactured material but not to the manufactured shot.

A PPEAL from a decree of the Orphans' Court awarding to the testator's son a Shot Tower, with its machinery and utensils, but excluding manufactured shot and unmanufactured material on the premises at the time of the testator's death. The opinion sufficiently states the case.

George W. Biddle and Eli K. Price, for appellant. Where one word, particularizing one limited description of property, is followed in a will by general words, the first word used will not cut down the general words to property of the same character as that comprised in the simple word. *Swinfen v. Swinfen*, 29 Beav. 209; *Arnold v. Arnold*, 2 Myl. & K. 373.

The words “personal property therein and thereto belonging” include the lead unmanufactured and in process of manufacture, and the shot actually manufactured in the testator's Shot Tower, at the time of his death.

The words are “personal property therein *and* thereto belonging.” The meaning of these words is “personal property therein and personal property thereto belonging.” The word “and” is here used cumulatively.

The intent of the testator, as gathered from his whole will, coupled with his intention to put his son into the business, demonstrates that he intended, by the fourth item of his will, to pass the

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whole of the Shot Tower property and stock thereof to his son, Thomas Weston Sparks, as a going concern.

John G. Johnson, for appellee. The words of the will are the "Shot Tower property;" within such a subject-matter, shot, balls and lead are not included. It was the personal property "therein," which possessed the characteristic of an *appurtenance*, of being a "belonging" of the "Shot Tower and buildings" the testator wished his son to take. The personal property he intended was such as was an "appurtenance of the realty." Shot and lead were not embraced in this intent.

Even were the words, "personal property therein and thereto belonging," first used, broad enough to give to appellant all he claims, the context would render it impossible thus to construe them. The testator shows that what he meant to give to his son was something capable of being rented. It was also to be kept in "repair and perpetually insured" and the executors were authorized to "sell" and to "grant and convey" the same to purchasers "in fee-simple or otherwise." Surely those terms were not applied to "shot and lead."

The father did not give to the son the business, but only the appliances with which he could carry on one for himself, at the old location.

WOODWARD, J. This appeal has brought up a single question for determination. Thomas Sparks died on the 17th of October, 1874. The fourth section of his will, which had been executed two years before, contained this provision: "I hereby give, devise and bequeath to my son, Thomas Weston Sparks, and to his heirs and assigns forever, upon his attaining the age of twenty-one years, all my Shot Tower property, consisting of Shot Tower, buildings and lots of ground connected therewith, situate on the south side of Carpenter street, * * * with all the appurtenances, machinery, fixtures and personal property therein and thereunto belonging." The second section of the codicil, executed on the 18th of December, 1873, made a similar gift, devise and bequest to his son of the lot known as the Old Swedes' Burial-ground, which the testator had purchased after making his will, adjoining the Shot Tower property, and which he desired should "form part thereof." The auditor found that at the

date of the testator's death, there were stock and manufactured goods in the Shot Tower property of the value of \$21,235.96. In this aggregate, drop-shot appraised at \$13,213.55, and buck-shot appraised at \$2,038.12 were included. The balance amounted to \$5,984.29. It was made up of various items, consisting of bar, pig and black lead, of "sundry metals," of bagging, of arsenic, of gas, pea and egg coal, of pine wood and of new and old kegs. At the audit, Thomas Weston Sparks, the appellant, claimed that under the terms of his father's will he was entitled to the value of the entire personal property, which had been inventoried as "stock in factory." The claim was rejected by the auditor and his report was confirmed by the Orphans' Court.

The will of Mr. Sparks was very carefully drawn. Out of the thirty-eight items by which he disposed of his estate, the formula "I give and bequeath," was adopted in thirty-four. These embraced all the bequests of personal property. In the second, a gift of real estate to his wife for life, and in the fourteenth, a gift of a house in Germantown, to his sister-in-law, Mrs. Thomson, for life were made, and the words, "I give and devise" were used. The phrase, "I give, devise and bequeath," was employed only in the gift to his son in the fourth item and in the residuary clause. The same phrase was used in the second section of the codicil, by which the Old Swedes' Burial-ground was given to his son. Throughout, there was manifest method in the use of terms. As "the lot immediately adjoining on the north the Shot Tower property" was to form part of it, the testator assumed, that like the other lots, it would become a depository for chattels belonging to or connected with the business, and he directed therefore that they with other such chattels should go to the devisee. It seems clear from a scrutiny of this elaborate instrument that its draughtsman employed no superfluous, ambiguous or senseless words.

What, then, was the purpose of the testator in adding to the devise of the Shot Tower property with its appurtenances, machinery and fixtures, a bequest to his son of "the personal property therein and thereto belonging?" The devise would have carried the fixtures, furniture and tools. The bequest meant to embrace something beyond them, or it had no meaning at all. It is the duty of all courts to give due effect to all the provisions of a dead man's will. No one of them is to be cast aside as a jargon except where its absurdity is absolute. Mr. Sparks desired and designed that upon

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the happening of his own death his son should be able to carry on his business at the age of twenty-one. He had started in business at the age of seventeen, and had educated himself to this end. He knew — none could know so well — that the operations of the Shot Tower property would always require large quantities of costly manufacturing materials at hand. If at the moment of his death these materials were to pass into the possession of his personal representatives instead of his residuary estate, the whole business would be disrupted and deranged, and if the devisee should have died, it would possibly be destroyed. It was to guard against such a contingency that the testator made the bequest of the Shot Tower property to his son. Lead, bagging, arsenic, coal, &c., had become by their purchase and deposit in the factory itself. As means and materials for carrying on the business they had acquired the value that attaches to such property by necessity. Apart from such a connection, some of the materials would have had the value of the open market, and some of them would have been useless and worthless. When Mr. Sparks died, "the property" designed to be used in making shot had been used for the purposes of the factory. It "belonged" to the factory property.

Nothing in the later provisions of the fourth section of the will is inconsistent with the view that has been taken of the testator. In the event of the death of the devisee in minority, "the same," that is, the whole real and personal estate devised and bequeathed was to become part of the residuary estate. The "Shot Tower property and appurtenances" were to be let or rented during the devisee's minority, and the proceeds were to be a part of the residue also. And power was given to the trustees to sell "the said Shot Tower property" at their discretion, and to use the proceeds in such securities as they should deem proper, and to add the income into the residue; to assign the securities to the devisee when he should reach the age of twenty-one, or if he should die before reaching that age, to add it to the residue. In the direction to rent, and in the power given to the trustees to sell, there was no personal property in contemplation. The residue was provided for. It was to go to his son if he lived to the age of twenty-one years old. It was to go into the residue if he died in his minority. Whilst it would have passed to

nor a purchaser of the realty, its existence, availability and adaptation to the purposes of the business, would have proved advantageous. It would have increased the rental value if a lease had been made, and enhanced the purchase price in the event of sale. The business was in fact carried on during the nine months of the appellant's minority by the widow of the testator. When he attained his majority the property passed into his hands, and the original design of his father was carried out.

But the appellant's claim before the auditor embraced not only the articles that were to be worked up, but the drop-shot and buck-shot which happened to be in the factory when the testator died. These were personal property upon the premises, certainly, but they were there only to await shipment to customers or transfer to the store. They were manufactured goods, articles of commerce, finished and prepared for sale. Whilst the testator was able to foresee that stock and materials for manufacture would be always in the factory, he could not anticipate what, if any, quantity of goods completed for the market would be left there at any point of time after his will was made. Subject as it was to constant fluctuations in quantity, it would seem impossible that this property could have been in the testator's mind. Business conditions can be conceived under which it would accumulate in vast volume. And business conditions can be conceived under which the factory would be swept bare of every pound.

It is now adjudged and decreed that the decree of the Orphan's Court be so amended and modified that Thomas Weston Sparks shall be allowed and paid the sum of \$5,984.29, being the value of the manufacturing materials in and upon the Shot Tower property at the date of Thomas Sparks' death; that with this modification the said decree be affirmed, and that the costs of this appeal be paid out of the fund for distribution.

Decree affirmed.

HEISKELL V. FARMERS AND MECHANICS' NAT

(89 Penn. St. 155.)

*Bill of lading — rights of indorsee — unauthorized delivery
other.*

M., at Galveston, Texas, for account and by direction of purchased cotton and shipped it *via* New York. The n to M. by B., and M. purchased the cotton in his own na agreement with B., made drafts on H. therefor payab attached the bills of lading. B. transmitted the drafts v ing to the plaintiff for collection, with instructions attac lading until draft is paid." H. accepted the drafts on arrival at Philadelphia, in accordance with a previous was delivered by the carrier to H., without presentation c and without the plaintiff's knowledge, and H. stored it and received from him an advance of \$10,000. H. th learning of the delivery the plaintiff brought replevin.

REPLEVIN of cotton by Farmers and Mec Bank against Heiskell and others. The o facts. The plaintiff had judgment and Heiskell i

James E. Gowen and J. B. Townsend, for p Ball, Hutchings & Co. did not take as purchasers title to the cotton, but as pledgees to secure the advances. The right which Morey & Co. passed indorsement of the bill of lading was that of pled no greater right accrued to the bank. No assign a bill of lading can have a higher right than the order it is issued. The bank therefore had no ri bills of lading after the acceptance of the drafts. *of Commerce v. Merchants' National Bank*, 1 Otto

The carrier was the agent of the holder of the preserving the lien of the latter on the goods, an responsibility of delivering the goods to a party w be the buyer, without requiring the production of l especially where the course of previous dealing h to infer that the holder of the bill of lading conser to the buyer of the goods, the title to the buyer j give protection to *bona fide* purchasers from him

Heiskell v. Farmers and Mechanics' National Bank.

the carrier. *Ontario Bank v. New Jersey Steamboat Co.*, 59 N. Y. 510.

John G. Johnson and *Richard L. Ashhurst*, for defendant in error.

STERRETT, J. The bills of lading, taken by J. M. Morey & Co., for delivery to their order, were symbols of property in the cotton, and when properly indorsed and delivered by them to Ball, Hutchings & Co. operated, in law, as a delivery of the cotton itself; thus investing the indorsees with a constructive custody which served all the purposes of an actual possession, and so continued until there was a valid and complete delivery of the property, under and in pursuance of the bills of lading, to a person entitled to receive the same. The special property and possession thus acquired by Ball, Hutchings & Co. were transferred by them to the National City Bank of New York for collection of the drafts to which the bills of lading were attached, and by it, in turn, to the Farmers and Mechanics' National Bank, defendant in error.

There was no dispute as to the material facts of the case. It was clearly shown, *inter alia*, that the cotton was purchased by J. M. Morey & Co., of Galveston, Texas, for account and by direction of J. F. Hellen, of Philadelphia, and shipped *via* New York, from the former to the latter port; that Morey & Co. not having been provided with funds, requested Ball, Hutchings & Co., to advance money to buy the cotton, which they agreed to do, upon the express condition that they should be furnished with the insurance certificates and drafts drawn on Hellen for the price, together with the bills of lading, and that they should hold the latter, as well as the cotton, until the drafts were not only accepted, but paid; that with the funds thus advanced on the faith of this arrangement, Morey & Co. purchased and shipped the cotton in their own name, drew on Hellen at thirty days' sight for the amount, and according to agreement, indorsed the drafts and bills of lading to Ball, Hutchings & Co., who transmitted them, duly indorsed, to the bank in New York, by which they were sent to the defendant in error; that both banks were instructed to retain the bills of lading until actual payment of the drafts, to each of which was attached a bill of lading with a slip of paper on which was written: "Hold bill of lading until draft is paid;" that the drafts with the bills of lading thus

attached were duly presented to and accepted by Hellen, who neither then nor afterward demanded the bills of lading ; that in due time the cotton arrived at Philadelphia and was delivered by the Express Steamboat Co. to Hellen, without knowledge of the bank or presentation of the bills of lading ; that Hellen immediately stored the cotton with the plaintiff in error and received an advance thereon of \$10,000 ; and as soon as the bank learned that the cotton had been delivered and stored, the writ of replevin was issued.

The court, after calling attention of the jury to the testimony as to the terms on which Morey & Co. procured the money with which the cotton was purchased, and what was done in pursuance of their agreement with Ball, Hutchings & Co., instructed them that if they believed this testimony and found the facts as indicated by it, their verdict should be in favor of the plaintiff below, and they so found. As already stated, the material facts referred to by the court were not controverted, and the jury, under the instructions of the court, could have found no difficulty in rendering the verdict they did.

On the facts established by the verdict, the delivery to Hellen was unauthorized ; and the possession, acquired by the misdelivery of the cotton, gave him no higher or better right than he had before, viz., the right to the bills of lading, and consequently to the cotton, upon payment of his acceptances, to which the bills were attached as already stated. Numerous authorities might be cited in support of these views, among which are the following: *Dows v. National Exchange Bank of Milwaukee*, 1 Otto, 618, in which a very able and exhaustive opinion was delivered by Mr. Justice STRONG ; *Stollenwerck v. Thacher*, 115 Mass. 224 ; *Aldermen v. Eastern Railroad Co.*, id. 233 ; *Meyerstein v. Barber*, L. R., 2 C. P. 38 ; *Turner v. Trustees, etc.*, 6 Exch. 543 ; *Jenkyns v. Brown*, 14 Q. B. 496 ; *Henry v. Warehouse Co.*, 31 P. F. Smith, 76 ; Benj. on Sales, 381, 382 and note. *Meyerstein v. Barber, supra*, was a case in which advances had been made on cotton shipped from Madras to London, and bills of lading delivered to secure the lender. It is there said by Chief Justice ERLE, " If it were established that a bill of lading—one of the most frequent securities for advances amongst mercantile men—becomes exhausted and ceases to be a security when the ship has reached her destination, and the goods which it represents have been landed and warehoused, what a wide door would be opened for fraud ! It is scarcely possible to exaggerate the

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error the money was paid under protest, and they were cases of fraudulent exaction. Here there was no protest nor exaction.

STERRETT, J. The case stated in the nature of a special verdict fully presents the facts upon which the judgment of the court below was based. The questions submitted for determination were, whether, upon the admitted facts, the defendant, as shipping commissioner under the act of Congress, was entitled to demand and receive from the company plaintiff a fee of \$2 for reshipping members of the crew of its vessel for the next voyage, after the return of the same vessel to the port of Philadelphia; and if not, whether the plaintiff was entitled to recover, in this suit, the fees so demanded and paid?

The learned judge deemed it unnecessary to express any opinion as to the first, for the reason that the law of the case, as he viewed it, was conclusively against the plaintiff on the second question. It was his opinion that the payments in question were voluntarily made with a full knowledge of the facts, and therefore assuming that they were made in ignorance of the law, there could be no recovery.

The United States Shipping Act of June 7, 1872, passed for the protection and benefit of merchant seamen, provides for the appointment of a shipping commissioner, who, before entering on the duties of his office, is required to give bond with sureties in not less than \$5,000, take and subscribe an oath to support the Constitution, and discharge his duties to the best of his ability and according to law. The powers with which he is clothed are commensurate with the important duties he is required to perform. Section 4511, Revised Statutes, provides that "the master of every vessel, bound from a port in the United States to any foreign port, other than vessels engaged in trade between the West India Islands or the Republic of Mexico, or any vessel of the burthen of seventy-five tons or upwards, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall, before he proceeds on such voyage, make an agreement in writing or print, with every seaman whom he carries to sea as one of the crew," in the form specifically prescribed by the statute. The next section requires every such agreement to be signed in duplicate by each seaman in the presence of the commissioner, who shall retain one part, and the other shall be delivered to the master of the vessel. The next section declares

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that section 4511, above quoted, "shall not apply where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage, nor to the masters of coastwise, nor to the masters of lake-going vessels that touch at foreign ports; *but seamen may, by agreement, serve on board such vessels a definite time, or on the return of a vessel to a port in the United States, may reship and sail in the same vessel on another voyage, without the payment of additional fees to the shipping commissioner by either the seamen or the master.*" The statute also provides that the commissioner shall be entitled to receive a fee of \$2 each for engaging, and fifty cents each for discharging the crew, to be paid by the owner, consignee, agent or master of the vessel who is authorized to reimburse himself in part by afterward deducting from the voyage of each seaman twenty-five cents for each fee so paid. It is also required that the commissioner "shall cause a scale of the fees payable to be prepaid, and to be conspicuously placed in the shipping office, and may refuse to proceed with any engagement or discharge, unless the fees payable thereon are first paid." If the fees and emoluments exceed \$5000 per annum, such excess is required to be paid into the treasury of the United States.

As to the rights of the commissioner to the shipping fees in dispute, the question arises under the last clause of section 4511, above quoted and italicised. There appears to be little if any room for doubt as to the meaning of the statute. It provides in express terms that a seaman who, on the return of any vessel to a port in the United States, reships and sails in the same vessel on another voyage, may do so "without the payment of additional fees to the shipping commissioner by either the seaman or the master; and we have no doubt this provision applies as often as he may reship on successive subsequent voyages. It appears that the right of the commissioner to demand the shipping fee is thus limited to new members of a crew who are procured through the agency of his office, thus exempting those who voluntarily continue in the ship's service. This discrimination, in favor of the latter class, may have been made for the purpose of encouraging a more steady and continuous service, and at the same time making it to be the interest of masters to so treat their crews as to induce them to remain in the service of the vessel; but if the language of the statute, fairly construed, means what we think it does, it is not necessary that a satisfactory motive for the distinction should appear. Nor is it

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any objection to this construction that it deprives the commissioner of compensation for reshipping the favored class. He is clearly entitled to the fee for the first shipment and every reshipment that does not come within the exemption of the act, and to the discharge fee in every case. Congress doubtless considered that this would afford ample remuneration for all services required. Without pausing to notice the construction contended for by the defendant, we are of opinion that on the first question the law is with the plaintiff; that no warrant can be found for demanding the fees in question, and therefore they were illegally demanded.

As to the second question, the right of the plaintiff to recover in this action for the fees so improperly demanded and paid, it is, perhaps, not quite so clear; but we think that sound public policy requires us to hold that a public officer who, *virtute officii*, demands and takes as fees for his services, what is not authorized, or more than is allowed by law, should be compelled to make restitution. He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services; but with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands. Hence it is that for the official wrong of taking illegal fees, a statutory penalty is provided in favor of the party aggrieved. Nearly all the precedents we have in this State are cases of this nature, and while much that has been said, in deciding cases of this class, must be regarded as mere *dicta*, it still indicates the personal views of distinguished judges on the subject.

In *Prior v. Craig*, 5 S. & R. 44, Justice GIBSON says: "It is true an action of assumpsit to recover back fees illegally taken may be sustained against a justice of the peace, without giving him notice, for the plaintiff thereby waives the official tort, as he may well do, and goes only for the money extorted." To the same effect is *Walker v. Ham*, 2 N. H. 238. Again, in *Reed's Adm'r v. Cist*, 7 S. & R. 183, in which the action was by the personal representative of the injured party for the statutory penalty, the court remarked, "The plaintiff could recover back any thing beyond the legal fees, but not for the forfeiture or penalty." In an action by

a sheriff for fees, the defendant was allowed to set off former fees illegally demanded and paid to the plaintiff; and in so ruling, the court said, that if the defendant paid more money to the sheriff than he was entitled to demand, he cannot, upon any grounds of either law or equity, retain it. *Dew v. Parsons*, 2 B. & Ald. 562.

In *Steel v. Williams*, 8 Exch. 625, it is said by one of the judges that "any person who illegally takes money under color of an act of Parliament, is liable to be sued for it, though the money is not to go into his own pocket." The language of Judge WOODRUFF in *Fire Ins. Co. v. Britton*, 8 Bosw. 148, is in point. He says, in sustaining an action against a public officer for money illegally demanded and paid, "It should be deemed sufficient that the officer takes advantage of his official position to make the exaction; due protection to those whose necessities require them to deal with persons exercising official powers, or discharging duties in their nature official, requires the moneys so paid should be the subject of reclamation." The case of *Ogden v. Maxwell*, 3 Blatchf. 319, is perhaps more nearly in point than any to which we have been referred. It was a suit against the collector of the port of New York, to recover excessive fees charged by him for issuing landing permits for passengers' baggage. One ground of defense set up was that the collector was required to pay the government any excess of fees over a certain sum, and it was held that this was no defense, even if such excess had been paid over. The following extract from the opinion of Judge BETTS indicates the principle on which the action was sustained: "The high character of the collector takes away every color of suspicion that in these cases he was actuated by any wrongful motives. He administered his office as he found his predecessor had done. * * * And it is not necessary to the maintenance of a civil action for the recovery of money wrongfully collected, that any turpitude should be proved against the officer. The suit rests on no illegal purpose of the defendant in exacting the payment. It is well sustained if his official power was exercised in the collection without warrant of law."

There is nothing in the suggestion that the State courts have no right to entertain suits against officers of the general government for acts done by virtue of their office. The right has been repeatedly recognized. It is scarcely necessary to add that our own cases in which taxes voluntarily paid to the public collector have not been permitted to be recovered stand on a different basis.

 Scott v. Kittanning Coal Co.

Judgment reversed and judgment is now entered in favor of the plaintiff and against the defendant, for \$4,878 with interest, to be ascertained as provided for in the case stated.

Judgment reversed.

SCOTT V. KITTANNING COAL CO.

(89 Penn. St. 331.)

Contract — successive deliveries — breach — remedy — set-off.

A contract to deliver 50,000 tons of coal in a year, at the rate of 6,000 tons a month, at the buyer's option, upon monthly notice of the quantity required for the next month, is severable, and where the contract has been partly performed, and the portion delivered has been paid for and consumed, but a portion of the coal so delivered and consumed was of inferior quality to that demanded by the contract, no right to rescind the contract is raised, but in an action by the vendor for a breach of the contract the defendant may set off his damages by reason of such substitution.*

ACTION of damages for breach of contract to buy coal. Plea, *non-assumpsit*. The opinion sufficiently states the case. The plaintiff had judgment below.

Samuel Dickson and John C. Bullitt, for plaintiffs in error

A. Sydney Bedille and R. C. McMurtrie, for defendants in error.

TRUNKEY, J. The Kittanning Coal Company agreed to deliver, on board vessels at Greenwich wharves, fifty thousand tons of its best run of mine bituminous coal, denominated Excelsior vein, from collieries in Clearfield county, commencing with March 1st, 1874, and ending with February, 1875, at the rate of six thousand tons monthly, at the option of John C. Scott & Sons, they giving notice on or before the 25th day of each month of their requirements for the succeeding month. Scott & Sons agreed to furnish vessels for and receive the above stated quantity of coal, and make payment therefor at thirty days from date of each bill of lading.

*Compare *King Phillip Mills v. Slater* (12 R. I. 80), 34 Am. Rep.; also 19 Am. Law Rep. (N. S.) 418.

That the contract was not entire, but severable, is obvious. *Lucas Oil Co. v. Brewer*, 16 P. F. Smith, 351; *Morgan v. McKee*, 27 id. 228.

The company delivered, and Scott & Sons received, under this contract, eighteen thousand thirty-eight and one-half tons of coal. This must be taken as an uncontroverted fact. The defendants affirm it. The plaintiffs proved it in the first breath of their testimony, repeated it, and added that this suit was brought to recover the damages sustained by the company by the neglect of Scott & Sons to take (or rather call for, when the amount would have been readily supplied) the balance of the fifty thousand tons at the price named in the contract; and in their declaration aver that they "have done all things on their part required by the said agreement to be done, and were always ready and willing to deliver coal pursuant to their said contract to said defendants; and although said defendants did accept and pay for a small quantity of said coal, to wit, ten thousand tons, yet they, the said defendants, did not, nor would not, during the term of the said agreement, receive the residue of said coal."

During the whole time for delivery and receiving of the coal the defendants gave no notice, on or before the 25th of any month, of their requirements for the succeeding month. Deliveries were made from time to time, as called for, beginning in March and ending in October. This also both parties affirm.

It was the duty of the defendants to make the calls for the coal, not exceeding six thousand tons per month, and receive the same, so as to permit delivery of the fifty thousand tons within the time limited.

[Omitting a minor point.]

When notice was given to the plaintiffs, if they were bound to deliver at all in pursuance thereof, they were bound to deliver the very coal designated by the contract. They could not lawfully substitute any other without defendants' consent, and defendants could have refused any other coal, whether inferior or superior, for they were entitled to the specified article. If the plaintiffs stealthily substituted inferior coal, they perpetrated a fraud upon defendants, for which they are answerable. If authority were wanting for the foregoing, it is in the cases cited by defendants, but it is not gainsaid.

It is contended by defendants that if fraudulent substitution of

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coal was made in the delivery, they may now rescind the contract. The cases cited, we think, do not rule this. Where a servant or laborer claims wages, a physician or attorney fees, an agent or trustee commissions, fidelity lies at the bottom of the service, the breach whereof forfeits right of compensation. If two have an executory contract and one colludes with the other's agent respecting its performance; or if in an agreement for sale, the price to be fixed by C., one party bribes C., the wrong-doer shall not profit by his turpitude, nor by the agreement itself. In a sale and delivery of goods there is not such relation of trust and confidence as where one does service for another, and in delivery of a similar but different article there may be no fraudulent intent, and if there be it is not of so heinous a nature as bribing a referee or corrupting the other's agent. True, a fraudulent delivery of one article for another authorizes rescission of an entire contract, perhaps would of a severable one, but not after the goods had been accepted, paid for and consumed. Rescission is one form of remedy for a defrauded party; which generally he may exercise upon discovery of the fraud, though he cannot wholly restore; and if the fraud be not discovered in time for that remedy, others remain whereby he may recover damages. This contract was severable and the coal delivered was paid for and used by defendants. They can restore nothing. They never notified plaintiffs that they would receive no more coal for their default in performance. We are not convinced that there was error in holding that the appropriate remedy for the alleged fraud, discovered at the trial, was by set-off or action for damages.

[Omitting minor points.]

By the plea of non-assumpsit, the defendant puts the plaintiff on proving his whole case, and entitles himself to give in evidence any thing which shows that at the time the action was commenced, the plaintiff had no right to recover. *Heck v. Shoner*, 4 S. & R. 249. That action was for housekeeper's services and for goods sold, and it was held that under the plea, evidence was admissible that the plaintiff had embezzled goods of defendant, not as a set-off, but to defeat the action. "As to the objection of the plaintiff being taken by surprise, it is no greater surprise than when, under the same plea, the defendant gives in evidence a release, infancy or coverture. Neither do I think there is much force in the other objection, that the matter of the evidence is not a liquidated debt

or demand. If it is of sufficient magnitude to bar the plaintiff's action, there will be no need of going into calculations. But if not sufficient for that purpose, it is as easy for the jury in this action to ascertain the amount to be deducted from the plaintiff's demand, as it is for the jury in an action to be brought by the defendant against the plaintiff to ascertain the amount of his damages." Per TILGHMAN, C. J. Under this plea the defendant may show that the plaintiff is an insolvent debtor and the cause of action vested in his trustees; that the plaintiff accepted goods at another place than that mentioned in the contract; a former recovery; and that the work for which the plaintiff claims was done in an unworkmanlike manner. *Kennedy v. Ferris*, 5 S. & R. 394; *Scott v. Province*, 1 Pitts. 189; *Gilchrist v. Bale*, 8 Watts, 355; *Gaw v. Wolcott*, 10 Barr, 43. In *Falconer v. Smith*, 6 Harr. 130, it was held that, in an action on notes given for machinery, it was competent for the defendant to prove that when the agreement was made the plaintiff warranted the machinery to be of a certain quality and that the warranty had failed, though the notes were given several months after the date of the agreement. The plea of non-assumpsit "entitles the defendant, without prior special notice, to give evidence of any thing which shows *ex æquo et bono*, the plaintiff ought not to recover. This is emphatically true of matters of defense springing from or immediately connected with the transaction sued on, and impeaching the consideration of the contract averred by the plaintiff. * * * It is true that under our more recent decisions, unliquidated damages for a breach of warranty may be averred as a matter of set-off, and then a special plea or notice would be necessary; but as was justly observed in *Sadler v. Slobaugh*, 3 S. & R. 388, a breach of warranty may, at the option of the defendant, be either reserved as the foundation of a separate action, or set up as a defense going to the consideration of the assumpsit sued on." Per BELL, J.

In various forms the defendant offered to prove that the plaintiffs fraudulently substituted inferior coal from other mines for that which they had contracted to deliver, and concealing this fact, delivered the inferior article in part performance of the contract; that the defendants did not know at the time of such deliveries that the coal was of this inferior character; that finding objections made by their customers they inquired of plaintiffs and were assured by them that the coal delivered was of the kind stipulated,

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and they accepted and paid for the same as part of the coal mentioned in the contract, believing it to be such; and that this fraudulent substitution involved the defendants in great loss, prevented them from making sales of the balance of the coal mentioned in the contract, and disabled them from receiving the same.

At present it must be taken as if they had the testimony at hand to establish the facts in the offers. Had it been received it might have availed as a complete defense. The matter was immediately connected with the transaction which is the basis of this suit; it shows a willful injury in the performance of part of a contract by the plaintiffs upon which they claim damages because the defendants fail to perform. By the settled law of this State the offered testimony was admissible under defendants' plea of *non assumpserunt*, not to prove a set-off, but to prove that the plaintiffs had no right to recover. Besides, it was again specially offered as tending to prove that the plaintiffs were not ready and willing to deliver the coal stipulated in the contract. Why was it not admissible for this purpose? If the company pretend they were always ready and willing to perform, is it not evidence in rebuttal that when called on for coal they gave it from other mines? Slight it may be in the opinion of the court, but its weight was for the jury. We are of opinion there was error in rejecting the offers of testimony set forth in the second, third, fourth, fifteenth and nineteenth assignments.

Judgment reversed, and a *venire facias de novo* awarded.

Judgment reversed.

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(89 Penn. St. 261.)

Officer — action against recorder for imperfect search — priority.

L. applied to plaintiff for a loan of money to be secured by real estate mortgage. Searches of title were ordered from the defendant, the county recorder, by L., with the consent of the plaintiff's attorney. At the request of L. the defendant omitted stating certain mortgage incumbrances in his searches, on L.'s promise to have them satisfied. The plaintiff loaned the money on the faith of the searches, and the property having been foreclosed and sold under the omitted mortgages, whereby the plaintiff lost its money, *held*, that defendant was liable therefor, and that A.'s knowledge of the incumbrances was not imputable to the plaintiff. (See note, p. 760.)

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CASE. The opinion states the facts. The defendant had judgment below.

James H. Stevenson and David W. Sellers, for plaintiff in error.

A. Sydney Biddle, I. Newton Brown and G. W. Biddle, for defendant in error. Stevenson delegated to Leslie whatever authority he himself possessed as agent to order and obtain searches, and his right to do so is not questioned. He substituted another agent for himself in all matters relating to the obtaining from the recorder information as to the incumbrances. It cannot be seriously argued that to receive notice of an incumbrance is not within the sphere of duty of one himself a solicitor, who as such and in his own name directs searches. He cannot deny the scope of the agency by declaring that he intended that all the facts required should be on paper. One solicitor employed another solicitor for the purpose in question, and the scope of the agency is determined, not by the intention, but by the mode by which the authority was delegated. The agency is not defined by the intention of the principal, or even by the private instructions given to the agent, but by the authority with which the agent appears to be clothed, when dealing with the other party. *Hovey v. Blanchard*, 13 N. H. 145.

PAXSON, J. In 1872, Charles M. S. Leslie, a conveyancer of good standing in the city of Philadelphia, applied to the plaintiffs for the loan of some money, to be secured by mortgages upon his real estate. The application was favorably considered; the necessary papers were prepared, and mortgage searches obtained from the recorder of deeds. From each of the three searches thus obtained, a mortgage was omitted; the mortgaged premises were sold under the omitted mortgages, and the money loaned by the plaintiffs was wholly lost. This suit was brought against the recorder of deeds to recover the loss.

Upon the trial in the court below, it appeared that the searches were ordered by Mr. Leslie, with the consent of the plaintiff's solicitor, James H. Stevenson, Esq. In his testimony, Mr. Stevenson tells how this occurred. He says: "I drew the mortgage for \$1,600 referred to in this record; Mr. Leslie got this search with my permission; after producing it, and seeing that my mortgage was properly recorded, I paid him the money. Mr. Leslie said he

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was in a hurry to get his money, and that with my permission he would prepare an order for the search; he did, and I compared it with the description in the mortgage, and the date occurring in the title. He then, with my request, obtained the certificate from the recorder; he said he could obtain it more quickly than I could. I agreed to let him do it, and I paid him the money on the recorder's certificate."

It also appeared that the omitted mortgages were purposely left off the searches by the clerk, and that this was done at the request of Mr. Leslie, and upon his assurance that the said mortgages would be paid. Mr. Myers, the search clerk, said in his examination in chief: "I knew Leslie; I issued these searches; I knew these incumbrances were not on the search; I told Leslie to be sure and have them satisfied; he said he would; I did not certify the mortgages on record to Alexander Smith, because Mr. Leslie requested me not to, and told me it was all right, that he intended to pay them and have them satisfied out of the money he was to receive from the association."

Out of the foregoing condition of facts the learned counsel for the defendant constructed the somewhat ingenious defense: 1. That Leslie was the agent of the plaintiffs to procure the search; and 2. That having notice or knowledge of the omitted mortgages during the course of his procurement of the searches, his knowledge was the knowledge of the plaintiffs, and they could not recover. This view of the case was substantially sustained by the court below, and forms the subject of the second and third specifications of error.

In *Houseman v. Girard Mutual Building and Loan Association*, 31 P. F. Smith, 256, the question whether Leslie was the agent of the building association, or merely the servant or clerk of the conveyancer, was left undecided. It was not essential to the decision of that case for the reason that granted the agency, there was no proof that the agent acquired his knowledge of the omitted searches in the transaction in which he was employed. "There was not only no evidence of this," said Justice SHARSWOOD, "but it was plain that it had been gained before, and in an entirely different transaction." In the case in hand it is equally clear that Leslie's knowledge of the omitted incumbrances was not acquired in the course of the particular transaction. It is however attempted to take the case out of the ruling in *Houseman v.*

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Building Association, supra, for the reason that Mr. Leslie's attention was called to the omitted mortgages whilst procuring the searches.

We do not think it important to discuss the question how far Leslie's knowledge would have affected the plaintiffs, had he been their agent. It would be carrying the doctrine of agency beyond any recognized limits, were we to hold that Leslie was the agent of the plaintiffs for any purpose. The most that can be said, is that Mr. Stevenson, the plaintiff's solicitor, permitted him to procure the searches, in order that he (Leslie) might the sooner obtain the money. If an agent at all, he was the agent of Stevenson, and for the mere purpose of procuring a search, neither Stevenson nor Leslie had any thing to do with making the searches. Stevenson was employed as plaintiff's conveyancer, for the purpose of preparing the papers and ordering the necessary searches. It is not pretended that Stevenson had any authority from the company to employ any one under him. It needs no authority to show that an agent employed for a special purpose cannot, without express authority, employ one or more agents under him, so as to bind his principal.

The defendant's search clerk knew when he issued the searches that the plaintiffs were about to loan money upon the faith of them. He omitted the mortgages in question, upon Leslie's assurance that he would "have them satisfied out of the money he was to receive from the association." The recorder has no right to throw the disastrous results of the misplaced confidence of his clerk upon those who loaned their money upon the faith of his official certificate.

The judgment is reversed, and *venire facias de novo* awarded.

Judgment reversed.

NOTE BY THE REPORTER.—It will be useful in this connection to compare the case of *National Savings Bank of District of Columbia v. Ward*, 100 U. S. 195, particularly observing the third and fourth paragraphs from the close of the prevailing opinion. The syllabus and opinions are as follows:

C., who wished to borrow money on real estate, employed W., an attorney, to examine and certify to the recorded title of such estate. W. did examine and certified that the title of C. was good and the property unincumbered. Plaintiff, relying on this certificate, loaned C. money upon a mortgage on the estate. There was on the records a deed of C. conveying to another the estate, but W. overlooked this. *Held*, that W. was not liable to the plaintiff for loss by reason of the defect in the title.

While an attorney employed professionally is liable to the one employing him for the exercise of reasonable care and skill in the performance of the duties he undertakes, he is

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not liable to one between whom and himself the relation of client and attorney does not exist.

CLIFFORD, J. Attorneys employed by the purchasers of real property to investigate the title of the grantor prior to the purchase impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill. Addison on Cont. (6th ed.) 400.

Like care and skill are also required of attorneys when employed to investigate titles to real estate to ascertain whether it is a safe or sufficient security for a loan of money, the rule being that if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and a loss results to his employers from such neglect or want of care and skill, he shall be responsible to them for the consequences of such loss. Addison on Torts (Wood's ed.), 615.

Pursuant to that rule of law, the plaintiffs sued the defendant and alleged as the cause of action that they retained and employed him to examine and ascertain the title of the possessor of the premises described in the declaration, and to report to them the nature and extent of his title to the same, and they allege that he, the defendant, accepted the employment and reported to them that the title of the possessor of the premises was good and unincumbered.

Their theory as alleged in the declaration is that they procured that report with the view to the making of a loan, and they allege that upon the faith and credit of it they loaned the sum of \$3,500 to the pretended owner of the premises, and accepted as security for the same a trust deed of the property, whereas the borrower of the money was insolvent and had no title whatever to the premises, as fully and explicitly appears by a prior deed of conveyance duly recorded.

Process was duly served and the defendant appeared and pleaded the general issue, which was duly joined by the plaintiffs. Continuance followed, and at the opening of the next term the parties went to trial, and the verdict and judgment were in favor of the defendant. Exceptions were filed by the plaintiffs, and they sued out the present writ of error.

Six errors are assigned in this court, of which three will be separately examined. They are as follows, (1) That the court erred in ruling that some privity of contract, arising from an actual employment of the defendant by the plaintiffs, is necessary to enable the latter to maintain the action. (2) That the court erred in holding that the evidence introduced did not establish such a privity of contract between the parties as entitled the plaintiffs to recover. (3) That the court erred in instructing the jury that upon the whole evidence the verdict should be for the defendant.

Evidence was introduced by the plaintiffs tending to prove that the defendant is an attorney-at-law, doing business in the city, and that he held himself out to the public as a person skilled in the examination of titles to real estate situated in the district. That the claimant of the lot described in the transcript employed the defendant, in his professional character, to examine his title to that lot and to report to him the condition of the same, and that the defendant, pursuant to that employment, reported to his employer that his title to the lot is good and that the property is unincumbered, the report being signed by the defendant and his son.

It is not pretended by the plaintiffs that they ever employed the defendant to examine the title to the lot, and it appears that the report was made at the sole request of the claimant of the lot, without any knowledge on the part of the defendant as to the purpose for which it was obtained. All that is conceded by the plaintiffs, but they gave evidence to show that the claimant of the lot presented the certificate to certain brokers and employed them to negotiate a loan upon the property in his favor for \$3,500, on the faith of that certificate. Detailed statement is given in the transcript of the steps taken by the brokers to obtain the required loan, the substance of which is that they required the party to give a negotiable note for the amount, payable in one year, with ten per cent interest, and that he and his wife should execute a trust deed of the lot to them as trustees, to secure the payment of the note when due.

Preliminaries being arranged the brokers applied to the plaintiffs for the loan and ob-

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tained the same, giving the note and deed of trust with the certificate as security for the payment. Before accepting the papers the plaintiffs, through their agent, required the brokers to sign the name of the borrower to the formal application for the loan, as exhibited in the transcript, and that the certificate as to the title should be continued to the date of the transaction.

Throughout, the negotiation for the loan was conducted entirely by the brokers with the plaintiffs, and it was the borrower who procured the second certificate from the defendant, the evidence showing that the defendant never came in contact either with the plaintiffs or the brokers.

Payment of the note was not made at maturity, and when it was attempted to sell the premises under the trust deed, it was discovered that the certificates were untrue, and that the grantors, on the thirteenth of March previous, had conveyed the premises in fee simple by deed duly executed and recorded.

Attorneys-at-law are officers of the court, admitted as such by its order, but it is a mistake to suppose that they are officers of the United States, as they are neither elected nor appointed in the manner prescribed by the Constitution for the election or appointment of such officers. *Ex parte Garland*, 4 Wall. 333, 378.

When a person adopts the legal profession and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties, and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained. Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action, but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that the rule is, that if he acts with a proper degree of skill and with reasonable care, and to the best of his knowledge, he will not be held responsible. *Bowman v. Tallman*, 27 How. Pr. 212, 274.

If he falls in any of these respects he may, and sometimes does not only forfeit all claim for compensation, but may also render himself liable to his client for any damage he may sustain from such neglect. Such liabilities frequently arise, and an attorney may also be liable to his client for the consequences of his want of reasonable care or skill in matters not in litigation. Business men not infrequently seek legal advice in making or receiving conveyances of real property, and it is well settled that an attorney may be liable to his client for negligence or want of reasonable care and skill in examining titles in such cases, whether the error occurs in respect to the title of property purchased or in the covenants in the instrument of conveyance, where the property is sold.

Where the relation of attorney and client exists there is seldom any serious difficulty in determining whether the client has or has not a cause of action, or its nature and extent if one exists. Criteria of standard character are established in legal decisions by which every such controversy may be determined, but in the case before the court the defendant was never retained or employed by the plaintiffs, nor did they ever pay him any thing for making the certificates, nor did he ever perform any service at their request or in their behalf.

Neither fraud nor collusion is alleged or proved, and it is conceded that the certificates were made by the defendant at the request of the applicant for the loan, without any knowledge on the part of the defendant what use was to be made of the same or to whom they were to be presented. None of these matters are controverted, but the plaintiffs contend that an attorney in such a case is liable to the immediate sufferer for negligence in the examination of such a title, although he, the sufferer, did not employ the defendant, and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party.

Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients, may be regarded as attorneys-at-law within the meaning of that designation as used in this country, and all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise in

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such proceedings a reasonable degree of care, prudence, diligence and skill. Authorities everywhere support that proposition, but attorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard. Unless the client is injured by the deficiencies of his attorney he cannot maintain any action for damages, but if he is injured the true rule is that the attorney is liable for the want of such skill, care and diligence, as men of the legal profession commonly possess and exercise in such matters of professional employment.

Both parties concur in these suggestions, but the defendant insists that in order that such a liability may arise there must be some privity of contract between the parties to enable the plaintiffs to maintain the action; that inasmuch as the defendant was never retained or employed by the plaintiffs, and never rendered any service at their request or in their behalf, he cannot be held liable to them for any negligence or want of reasonable care, skill or diligence, in giving to a third party the certificates in question.

Beyond all doubt the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. *Shearm. & Redf. on Neg.*, § 215. Conclusive support to that rule is found in several cases of high authority. *Fish v. Kelly*, 17 C. B. (N. S.) 194.

Argument to show that the direct question was involved in that case was unnecessary, as the affirmative of the proposition sufficiently appears in the head-note, which is as follows: That an attorney is not liable to an action for negligence, at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of the deed.

Although the inquiry was addressed directly to the defendant and the case shows that the answer was given to the person making it, the court held, *EARL, C. J.*, giving the opinion, that there was no relation between the parties from which any contract could be implied, nor any relation between the parties from which any duty could arise. Mention is then made of the fact that the defendant was the solicitor of the trustees of a certain estate, and that the plaintiff was a workman in the employ of the trustees, from which the court deduced the conclusion that the parties did not stand in such a relation to each other as to make it any part of the duty of the defendant to give the plaintiff any professional advice. His answer was entirely erroneous, but the court decided that he could not be held responsible, unless it could be shown that at the time he made it he knew it to be false.

Sufficient appears even in that case alone to show that the ruling of the subordinate court is correct, but it is a mistake to suppose that the proposition is without other support than what is derived from the reasons there assigned for the conclusion. Prior to that the same question was decided by the highest court of the same country in the same way. Application to an insurance company was made by a certain party for a loan of money, which the company agreed to make if the party would insure his life and assign to them the policy and give sureties for the payment of interest on the loan. It appears that the plaintiffs became sureties for the applicant, and that the defendant, a law agent, employed by the principal who applied for the loan, drew up the papers in the transaction, among which was one intended for the security of the sureties, which proved to be incomplete. Loss was sustained by the sureties and they brought suit against the law agent, charging that the loss was occasioned by his negligence and want of skill and other fault. Appearance was entered by the defendant and he denied the alleged employment. Judgment was rendered for the plaintiffs in the lower court, and the defendant appealed to the House of Lords, where the appeal was argued by very able counsel. Opinions *seriatim* were delivered by the Law Lords. In substance and effect Lord CAMPBELL said that he never had any doubt of the unsoundness of the proposition that would maintain the action in such a case, and added that there must be a privity of contract between the parties, which was not proved in that case.

No attempt was made by the appellee to controvert that proposition, but his counsel contended that the law of Scotland was different; that by the law of the latter country a law agent, in respect of damage occasioned by his neglects, is responsible to those who suffer by his default, although there may not have subsisted the relation of principal and agent

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between them. It was Lord CRANWORTH who responded to that proposition, and in the course of his judgment he commented upon all the authorities cited in support of the same, and showed that they failed to establish it.

Emphatic concurrence in the conclusion announced by the chancellor was expressed by Lord WENSLEYDALE, to the effect following: That "he only who by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms."

By the law of England the right of action depends entirely upon the question between whom the relation of principal and agent, client and attorney subsists. Nothing more decisive of the question need be sought; and we have the authority of that great magistrate to say that it is impossible to support, by a single case, in that country, so extraordinary a proposition as that persons who were not, by themselves or their agents, employers of law agents to do an act, could have remedy against such agents for the negligent performance of it.

Speaking to the same point, Lord CHELMSFORD said, it is clear that this general proposition, abstracted from the facts of the case, cannot be maintained to its full extent, as it would apply to cases where there is no privity of contract between the parties, when it is conceded that no liability would arise. *Roberts v. Fleming*, 4 Macq. H. of L. Cas. 167, 209.

Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says BRASLEY, C. J., is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for the want of care in the exercise of employments or the transaction of business is plainly necessary, to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect. *Kahl v. Love*, 87 N. J. L. 5, 8.

Injury was received by the driver of a mail coach, which broke down from defects in its construction. He brought suit against the constructor of the coach, who sold the same to the owner of the line in whose employment the plaintiff was engaged when the accident happened. *Held*, by the whole court, that the action would not lie, as there is no privity of contract between the parties. Unless we confine the operation of such contracts as this to the parties who entered into them, said Lord ABINGER, the most absurd consequences, to which no limit can be seen, will ensue; and Baron ALDERSON remarked, if we hold that the plaintiff can sue in such a case there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that there is no reason why we should not go fifty. *Winterbottom v. Wright*, 10 Mees. & Wels. 109, 115.

Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and PARKE, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. *Longmeid v. Holliday*, 6 Ex. 761-767.

Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule, but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. These cases, say the court in that opinion, occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made, and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party even if the father or friend of the patient contracted with the wrongdoer. Reported cases of the kind are cited by the plaintiffs, but it is obvious that they have no proper application to the case before the court. *Pippin v. Shepard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. (N. C.) 733; *George v. Skivington*, L. R., 5 Exch. 1; *Railway v. Derby*, 14 How. 484.

Many judicial decisions in this country besides those cited also adopt the same rule and fully recognize the same class of exceptions.

Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises not out of any contract or direct privity between the wrong-doer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured. *Thomas v. Winchester*, 2 Seld. 397, 410.

Such an act of negligence being imminently dangerous to the lives of others, the wrong-doer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract. *Collis v. Selden*, L. R., 3 C. P. 496.

Builders of a public work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. *Albany v. Cunliff*, 2 Comst. 163, 174.

Misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the builders' negligence, and such negligence is not an act imminently dangerous to human life. *Loop v. Litchfield*, 42 N. Y. 351-358; s. c., 1 Am. Rep. 543.

So where the manufacturer of a steam-boiler sold it to a paper company, it was held that the seller was only liable to the purchaser for defective materials or for want of care and skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of third persons, the latter will have no cause of action against the manufacturer. *Losee v. Clute*, 51 N. Y. 494, 496; s. c., 10 Am. Rep. 638.

Exactly the same rule prevails in the State of Pennsylvania, independent of any statutory regulation upon the subject, the Supreme Court of the State holding that the liability of the recorder in such a case is to the party who asks and pays for the certificate, and not to his assigns or alienee. *Houseman v. Building and Loan Association*, 81 Penn. St. 256, 262.

Satisfactory proof is exhibited that the defendant was duly employed by the pretended owner of the lot to examine his title to the same, and it is conceded that he did so, or that his son made the search for him, and that he made and signed the certificates in question, and that he was paid for his services by his employer; nor is it questioned that the title was defective as alleged. Concede that and it follows as an implication of law that the defendant assumed to possess the requisite knowledge and experience to perform the stipulated service, and that he contracted with his employer that he would use reasonable care and skill in the performance of the duties. For a failure in either of these respects, if it resulted in damage to his employer, he, the employer, is entitled to recover compensation. *Chase v. Heaney*, 70 Ill. 268.

Decisions of the courts of the highest authority support that proposition, but the difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the titles or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him any thing for the service he did perform in respect to that transaction; nor is there any evidence tending to show any privity of contract between them and the defendant, within the meaning of the law, as expounded by the decisions of the court.

Every imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. Where there is fraud or collusion the party will be held liable, even though there is no privity of contract, but where there is neither fraud nor collusion nor privity of contract the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty. *Langridge v. Levy*, 2 M. & W. 519, 520.

We agree, said Lord DENMAN, C. J., and affirm the judgment, on the ground stated

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PARKE, B., that as there is fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of the results, the party guilty of the fraud is responsible to the party injured. *Langridge v. Levy*, 4 M. & W. 338.

Abstracts of titles and certificates of the same are frequently if not usually made by recorders, prothonotaries or clerks, and in some States their liability is prescribed and regulated by statute. Sess. Laws (Penn.) 1872, 1040.

By that act those officers are declared liable for all loss or damage which may happen by reason of any false or erroneous certificate of search, not only to the person or persons to, for or upon whose order the said certificate of search is made or given, but also to any person or persons claiming title through, from or under such person or persons, or who may suffer loss by reason of the making or giving of any such false or erroneous certificate. But it is unnecessary to enter into any discussion of such regulations, as it is clear that there are none such in this district which can have any application in this case.

Testimony was introduced at the trial tending to show that there is a local usage in the district that the attorney examining the title of such an applicant for a loan shall be considered as also acting for the lender of the money, and complaint is made that the court below did not submit that evidence to the jury, with proper instructions. Evidence of usage is not admissible to contradict or vary what is clear and unambiguous, or to restrict or enlarge what requires no explanation. Omissions may be supplied in some cases by such proof, but it cannot prevail over or nullify the express provisions of the contract. So, where there is no contract, proof of usage will not make one, and it can only be admitted to interpret the meaning of the language employed by the parties, where the meaning is equivocal or obscure. *Thompson v. Riggs*, 5 Wall. 663, 679.

Suffice it to say, these parties never met, and there was no communication of any kind between the defendant and the brokers, or the lenders of the money. Nothing of the kind is pretended, the only suggestion in that direction being that it may be held that the applicant for the loan, when he employed the defendant, may be regarded as the agent of the plaintiffs. Such suggestion, being entirely without evidence to support it, is entitled to no weight, especially as it appears that the principal certificate was procured several days before any interview upon the subject of the loan took place between the brokers and the plaintiffs.

WAITE, C. J., dissenting. I am unable to agree to the judgment in this case. I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person, as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found. That, as it seems to me, is this case. Ward was employed by Chapman to examine and certify to the title to a certain lot in Washington. The circumstances were such as ought to have satisfied him that his certificate was to be used by Chapman in some transaction with another person, as evidence of the facts certified to. In examining the records he overlooked a deed, in all respects properly recorded, which showed on its face that Chapman had conveyed the lot away in fee simple, and certified as follows: "Lot 55, in Chapman's subdivision of lots, in square 864. The title of Leonard S. Chapman to the above lot is good and the property is unincumbered. Wm. H. Ward." The National Savings Bank, relying on this certificate as true, loaned Chapman \$3,500, taking for security a deed of trust of the lot. It seems to me that under these circumstances Ward is liable to the bank for any loss it may sustain by reason of his erroneous certificate.

I am authorized to say that Justices SWAYNE and BRADLEY concur in this dissent.

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Decisions of the courts of the highest authority support that proposition, but the difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the titles or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him anything for the service he did perform in respect to that transaction; nor is there any evidence tending to show any privity of contract between them and the defendant, within the meaning of the law, as expounded by the decisions of the court.

Any imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. Where there is fraud or collusion the party is held liable, even though there is no privity of contract, but where there is neither fraud nor collusion nor privity of contract the party will not be held liable, unless the act is imminently dangerous to the lives of others, or is an act performed in pursuance of a legal duty. *Langridge v. Levy*, 2 M. & W. 519, 530.

We agree, said Lord DENMAN, C. J., and affirm the judgment, on the ground stated by

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liable only in case of gross negligence. Negligence is defined to be the absence of care, or the omission by a party to exercise that diligence which a prudent man ordinarily exercises in regard to his own property. Has the defendant in this case been guilty of that degree of negligence, viz., gross negligence?"

Had this definition been omitted it might have been presumed that the jury, from the use of the terms "slight care" and "gross negligence," would have reached a proper conclusion as to their meaning and effect, but in such case the presumption would be that the idea of ordinary care and ordinary prudence had been excluded, but this would necessarily exclude the learned judge's definition.

The fact is, the rule thus laid down by the court is the one which our brother WOODWARD, in the case of *Bank v. Graham*, 29 P. F. Smith, 106, Thomp. N. B. Cas. 875, adduces as decisive of the bailee's good faith and performance of his whole duty. In other words, as it is said by DUNCAN, J., in *Tompkins v. Saltmarsh*, 14 S. & R. 275, "the bailee without reward is not bound to ordinary diligence, is not responsible for that care which every attentive and diligent person takes of his own goods, but only for that care which the most inattentive take."

It follows that if the defendant committed only a breach of ordinary care and diligence, in the keeping of the plaintiff's bonds, the verdict should have been in its favor.

Conceding that the bank, in case of gross negligence, would be liable for the loss charged, and we do not stop to discuss this question, as it has been definitely settled in the case of *Bank v. Graham*, above cited,* then what remains is the inquiry whether the defendant was grossly negligent in the care of the property committed to its charge.

On this branch of the case the court charged that the mere fact that Blumer, the president, had used the bonds to raise money for his own private purposes, would not of itself make the bank liable, but if this improper use by him of the plaintiff's property was known to the bank officers, and they assented thereto, or if they had knowledge thereof, and made no effort to recover this property if it were recoverable, that would be such negligence on their part as would render the bank liable.

* See also S. C., 21 Am. Rep. 49, affirmed, 100 U. S. 699, Browne's Nat. Bk. Cas. 64; and to same effect, *Pattison v. Syracuse Nat. Bk.*, N. Y. Ct. App. 1880, Browne's Nat. Bk. Cas. 319.

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This is good, sound law, but we fail to discover the evidence which adapts it to this case. If there was any evidence showing knowledge on part of any of the bank officers but Blumer and his son, of or concerning these bonds or their use, proper or improper, it does not appear in the records submitted to us. For this and another error,

Judgment reversed and new venire awarded.

FIRST NATIONAL BANK OF ALLENTOWN V. HOCH.

(89 Penn St. 384.)

National bank — power to act as broker in purchase of securities.

A National bank has no inherent power to act as an agent in the purchase of bonds or stocks for third persons, and its president cannot bind it by an agreement so to act, without special authority.

ACTION on a certificate of deposit. The opinion states the case. The plaintiff had judgment below.

Edward Harvey and R. E. Wright, Jr., for plaintiff in error.

William P. Snyder and John Rupp, for defendant in error.

This paper is not merely a contract to buy bonds of the city of Allentown, but it is a certificate that Mr. Hoch has deposited in the First National Bank of Allentown \$1,000, which, with interest, is to be accounted for on demand. The bank could have discharged it at any time it saw fit, by paying or tendering the money to Mr. Hoch, and he might have gone to the bank at any time during banking hours and demanded the money.

Hoch paid the money to an officer of the bank, and if he was in default, and did not make the proper entries in the books of the bank, Hoch is not to be prejudiced thereby. The money having gone into the bank, through its proper officer, it is bound to repay it on demand, in accordance with the terms of deposit.

MERCUR, J. The plaintiff in error is a National bank. The suit was against the bank, on a receipt signed by the president thereof, in the following words, to wit:

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\$1,000.

ALLENTOWN, Dec. 18, 1875.

Received of Mr. William Hoch, one thousand dollars, to be invested in bonds of the city of Allentown, bearing seven per cent interest. Interest on the said deposit to be allowed from this date and to be accounted for on demand.

W. H. BLUMER,

President First Nat. Bank.

The defendant in error failing to obtain all the required bonds, or a return of the residue of the money, brought this suit.

The court directed the jury to return a verdict in his favor.

It is well-recognized law that a National bank is not, by its charter, authorized to act as a broker or agent in the purchase of bonds and stocks. Its specified powers given by statute, nor its incidental powers necessary to carry on the business of banking do not extend to the transaction of such business. *First Nat. Bank of Charlotte v. Exchange Bank*, 2 Otto, 122; *Thomp. N. B. Cas.* 124; *Fowler v. Scully*, 22 P. F. Smith, 462; s. c., 13 Am. Rep. 699; *Thomp. N. B. Cas.* 854. When the paper on its face shows the transaction not to be within the usual course of business of the bank, it is not binding on the bank, although signed by the president thereof, as such officer. He is the executive agent of the board of directors within the ordinary business of the bank, but cannot bind it by a contract outside thereof, without special authority. I do not understand these general rules to be denied. Some of them are expressly admitted, and the others impliedly conceded by the court below, and by the counsel for the defendant in error. The court ruled the case on the construction it gave to the receipt. The learned judge said to the jury, "the question as to whether the plaintiff is or is not entitled to recover in this action depends upon the construction that is put upon the receipt of December 18, 1875, which has been offered in evidence. It is the duty of the court to construe this paper. If this were an obligation on the part of the bank to purchase and furnish the plaintiff with the kind of security mentioned in the paper, it would be beyond the power of the bank or its president to enter into that obligation, and the plaintiff would not be entitled to recover. But I construe this paper to mean that it is an acknowledgment that the plaintiff did pay to the president of the defendant \$1,000, which was treated, according to the terms of the paper, as a deposit, and might be discharged by the bank, either by furnishing the bonds of the city of Allentown, or by repaying the money with interest."

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It was undoubtedly the duty of the court to construe the paper ; but we cannot concur in the construction given. The principal object of the contract, clearly shown by the receipt, was the purchase of bonds. That was the specific purpose for which the money was left and received. The language of the receipt assumed that the desired bonds could not be procured, and to prevent a loss of interest in the meantime, to the defendant in error, the latter clause was added. The primary thought and main intent of the contract was a purchase of bonds. The secondary one was to procure interest until the investment could be made.

While the word "deposit" does appear in the receipt, yet it is evidently used as a synonym for money or fund. The receipt does not state that the money is left as in the case of an ordinary deposit; nor that it shall be deposited in bank to his credit; nor was it ever so deposited. It was put in the hands of the city treasurer on the very day of its receipt, presumably for the purpose of getting the city bonds. The bank never received the money. It was never subject to the check drawn by the defendant in error on the bank. Although the transaction was with Blumer, as president of the bank, yet in all legal aspects, it was with him as an individual. Upon the uncontradicted testimony, the defendant in error was not entitled to recover.

Judgment reversed.

WALSH V. COMMONWEALTH.

(89 Penn. St 419.)

Constitutional law—"vacancy" in office—erection of new county.

Under a constitutional provision that the governor "may fill any vacancy that may happen * * * in any judicial or in any other elective office, which he is or may be authorized to fill; * * * but in any such case of vacancy in an elective office, a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election," a "vacancy" in the county offices "happens" when a new county is erected.

QUO WARRANTO by the Commonwealth, *ex relations* Evans against Walsh, to show cause by what authority he exercised

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tained the same, giving the note and deed of trust with the certificate as security for the payment. Before accepting the papers the plaintiffs, through their agent, required the brokers to sign the name of the borrower to the formal application for the loan, as exhibited in the transcript, and that the certificate as to the title should be continued to the date of the transaction,

Throughout, the negotiation for the loan was conducted entirely by the brokers with the plaintiffs, and it was the borrower who procured the second certificate from the defendant, the evidence showing that the defendant never came in contact either with the plaintiffs or the brokers.

Payment of the note was not made at maturity, and when it was attempted to sell the premises under the trust deed, it was discovered that the certificates were untrue, and that the grantors, on the thirteenth of March previous, had conveyed the premises in fee simple by deed duly executed and recorded.

Attorneys-at-law are officers of the court, admitted as such by its order, but it is a mistake to suppose that they are officers of the United States, as they are neither elected nor appointed in the manner prescribed by the Constitution for the election or appointment of such officers. *Ex parte Garland*, 4 Wall. 333, 378.

When a person adopts the legal profession and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties, and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained. Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action, but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that the rule is, that if he acts with a proper degree of skill and with reasonable care, and to the best of his knowledge, he will not be held responsible. *Bowman v. Tallman*, 27 How. Pr. 212, 274.

If he fails in any of these respects he may, and sometimes does not only forfeit all claim for compensation, but may also render himself liable to his client for any damage he may sustain from such neglect. Such liabilities frequently arise, and an attorney may also be liable to his client for the consequences of his want of reasonable care or skill in matters not in litigation. Business men not infrequently seek legal advice in making or receiving conveyances of real property, and it is well settled that an attorney may be liable to his client for negligence or want of reasonable care and skill in examining titles in such cases, whether the error occurs in respect to the title of property purchased or in the covenants in the instrument of conveyance, where the property is sold.

Where the relation of attorney and client exists there is seldom any serious difficulty in determining whether the client has or has not a cause of action, or its nature and extent if one exists. Criteria of standard character are established in legal decisions by which every such controversy may be determined, but in the case before the court the defendant was never retained or employed by the plaintiffs, nor did they ever pay him any thing for making the certificates, nor did he ever perform any service at their request or in their behalf.

Neither fraud nor collusion is alleged or proved, and it is conceded that the certificates were made by the defendant at the request of the applicant for the loan, without any knowledge on the part of the defendant what use was to be made of the same or to whom they were to be presented. None of these matters are controverted, but the plaintiffs contend that an attorney in such a case is liable to the immediate sufferer for negligence in the examination of such a title, although he, the sufferer, did not employ the defendant, and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party.

Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients, may be regarded as attorneys-at-law within the meaning of that designation as used in this country, and all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise in

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such proceedings a reasonable degree of care, prudence, diligence and skill. Authorities everywhere support that proposition, but attorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard. Unless the client is injured by the deficiencies of his attorney he cannot maintain any action for damages, but if he is injured the true rule is that the attorney is liable for the want of such skill, care and diligence, as men of the legal profession commonly possess and exercise in such matters of professional employment.

Both parties concur in these suggestions, but the defendant insists that in order that such a liability may arise there must be some privity of contract between the parties to enable the plaintiffs to maintain the action; that inasmuch as the defendant was never retained or employed by the plaintiffs, and never rendered any service at their request or in their behalf, he cannot be held liable to them for any negligence or want of reasonable care, skill or diligence, in giving to a third party the certificates in question.

Beyond all doubt the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. *Shearm. & Redf. on Neg.*, § 215. Conclusive support to that rule is found in several cases of high authority. *Fish v. Kelly*, 17 C. B. (N. S.) 194.

Argument to show that the direct question was involved in that case was unnecessary, as the affirmative of the proposition sufficiently appears in the head-note, which is as follows: That an attorney is not liable to an action for negligence, at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of the deed.

Although the inquiry was addressed directly to the defendant and the case shows that the answer was given to the person making it, the court held, *ERLE*, C. J., giving the opinion, that there was no relation between the parties from which any contract could be implied, nor any relation between the parties from which any duty could arise. Mention is then made of the fact that the defendant was the solicitor of the trustees of a certain estate, and that the plaintiff was a workman in the employ of the trustees, from which the court deduced the conclusion that the parties did not stand in such a relation to each other as to make it any part of the duty of the defendant to give the plaintiff any professional advice. His answer was entirely erroneous, but the court decided that he could not be held responsible, unless it could be shown that at the time he made it he knew it to be false.

Sufficient appears even in that case alone to show that the ruling of the subordinate court is correct, but it is a mistake to suppose that the proposition is without other support than what is derived from the reasons there assigned for the conclusion. Prior to that the same question was decided by the highest court of the same country in the same way. Application to an insurance company was made by a certain party for a loan of money, which the company agreed to make if the party would insure his life and assign to them the policy and give sureties for the payment of interest on the loan. It appears that the plaintiffs became sureties for the applicant, and that the defendant, a law agent, employed by the principal who applied for the loan, drew up the papers in the transaction, among which was one intended for the security of the sureties, which proved to be incomplete. Loss was sustained by the sureties and they brought suit against the law agent, charging that the loss was occasioned by his negligence and want of skill and other fault. Appearance was entered by the defendant and he denied the alleged employment. Judgment was rendered for the plaintiffs in the lower court, and the defendant appealed to the House of Lords, where the appeal was argued by very able counsel. Opinions *seriatim* were delivered by the Law Lords. In substance and effect Lord CAMPBELL said that he never had any doubt of the unsoundness of the proposition that would maintain the action in such a case, and added that there must be a privity of contract between the parties, which was not proved in that case.

No attempt was made by the appellee to controvert that proposition, but his counsel contended that the law of Scotland was different; that by the law of the latter country a law agent, in respect of damage occasioned by his neglects, is responsible to those who suffer by his default, although there may not have subsisted the relation of principal and agent

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between them. It was Lord CRANWORTH who responded to that proposition, and in the course of his judgment he commented upon all the authorities cited in support of the same, and showed that they failed to establish it.

Emphatic concurrence in the conclusion announced by the chancellor was expressed by Lord WENSLEYDALE, to the effect following: That "he only who by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms."

By the law of England the right of action depends entirely upon the question between whom the relation of principal and agent, client and attorney subsists. Nothing more decisive of the question need be sought; and we have the authority of that great magistrate to say that it is impossible to support, by a single case, in that country, so extraordinary a proposition as that persons who were not, by themselves or their agents, employers of law agents to do an act, could have remedy against such agents for the negligent performance of it.

Speaking to the same point, Lord CHELMSFORD said, it is clear that this general proposition, abstracted from the facts of the case, cannot be maintained to its full extent, as it would apply to cases where there is no privity of contract between the parties, when it is conceded that no liability would arise. *Roberts v. Fleming*, 4 Macq. H. of L. Cas. 167, 209.

Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says BRASLEY, C. J., is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for the want of care in the exercise of employments or the transaction of business is plainly necessary, to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect. *Kahl v. Love*, 87 N. J. L. 5, 8.

Injury was received by the driver of a mail coach, which broke down from defects in its construction. He brought suit against the constructor of the coach, who sold the same to the owner of the line in whose employment the plaintiff was engaged when the accident happened. *Held*, by the whole court, that the action would not lie, as there is no privity of contract between the parties. Unless we confine the operation of such contracts as this to the parties who entered into them, said Lord ABINGER, the most absurd consequences, to which no limit can be seen, will ensue; and Baron ALDERSON remarked, if we hold that the plaintiff can sue in such a case there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that there is no reason why we should not go fifty. *Winterbottom v. Wright*, 10 Mees. & Wels. 109, 115.

Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and PARKE, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. *Longmeid v. Holliday*, 6 Ex. 761-767.

Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule, but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. These cases, say the court in that opinion, occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made, and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party even if the father or friend of the patient contracted with the wrongdoer. Reported cases of the kind are cited by the plaintiffs, but it is obvious that they have no proper application to the case before the court. *Pippin v. Shepard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. (N. C.) 733; *George v. Skirvington*, L. R., 5 Exch. 1; *Railway v. Derby*, 14 How. 484.

Many judicial decisions in this country besides those cited also adopt the same rule and fully recognize the same class of exceptions.

Peabody Building and Loan Association v. Houseman.

Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises not out of any contract or direct privity between the wrong-doer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured. *Thomas v. Winchester*, 2 Seld. 397, 410.

Such an act of negligence being imminently dangerous to the lives of others, the wrong-doer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract. *Collis v. Selden*, L. R., 3 C. P. 496.

Builders of a public work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. *Albany v. Cunliff*, 2 Comst. 165, 174.

Misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the builders' negligence, and such negligence is not an act imminently dangerous to human life. *Loop v. Litchfield*, 42 N. Y. 351-358; s. c., 1 Am. Rep. 543.

So where the manufacturer of a steam-boiler sold it to a paper company, it was held that the seller was only liable to the purchaser for defective materials or for want of care and skill in its construction, and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of third persons, the latter will have no cause of action against the manufacturer. *Losee v. Clute*, 51 N. Y. 494, 496; s. c., 10 Am. Rep. 638.

Exactly the same rule prevails in the State of Pennsylvania, independent of any statutory regulation upon the subject, the Supreme Court of the State holding that the liability of the recorder in such a case is to the party who asks and pays for the certificate, and not to his assigns or alienee. *Houseman v. Building and Loan Association*, 81 Penn. St. 256, 262.

Satisfactory proof is exhibited that the defendant was duly employed by the pretended owner of the lot to examine his title to the same, and it is conceded that he did so, or that his son made the search for him, and that he made and signed the certificates in question, and that he was paid for his services by his employer; nor is it questioned that the title was defective as alleged. Concede that and it follows as an implication of law that the defendant assumed to possess the requisite knowledge and experience to perform the stipulated service, and that he contracted with his employer that he would use reasonable care and skill in the performance of the duties. For a failure in either of these respects, if it resulted in damage to his employer, he, the employer, is entitled to recover compensation. *Chase v. Heaney*, 70 Ill. 268.

Decisions of the courts of the highest authority support that proposition, but the difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the titles or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him any thing for the service he did perform in respect to that transaction; nor is there any evidence tending to show any privity of contract between them and the defendant, within the meaning of the law, as expounded by the decisions of the court.

Every imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. Where there is fraud or collusion the party will be held liable, even though there is no privity of contract, but where there is neither fraud nor collusion nor privity of contract the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty. *Langridge v. Levy*, 2 M. & W. 519, 530.

We agree, said Lord DENMAN, C. J., and affirm the judgment, on the ground stated by

the right of the people to elect their officers in the autumn of 1878. It was said that there was ample time after the proclamation to select candidates, and to provide that the rights of parties, individuals and the community should be secured from hazard. If this court had the power to say this, it is possible that this suggestion would be adopted. It is true that all formal details relating to assessments, revision of lists, the furnishing of ballot-boxes and blanks, and the notice to be given by the sheriff, could have been arranged in this interval of seventy-six days. But cases might occur where the interval would be forty, thirty, twenty or ten days. And it would be necessary to go into an inquiry in each instance into the adequacy of time to prepare for the election. To guard against a shifting rule like this, fortunately for the community and the courts, the Constitution has established an abiding and pervading system. It was the opinion of its framers that the work of selecting officers for the government of the Commonwealth, and of the counties of the Commonwealth, should be carefully and thoughtfully done. Haste, impulse and evil temper will enter into political contests, whatever safeguards may be thrown around the ballot, and whatever may be the period allowed for deliberation. But the Constitution has established the unbending rule that three full months shall be the period within which to prepare for an election to supply a vacancy, and during which mistakes may be corrected, prejudices may be overcome, ignorance may be enlightened, excitement may be allayed, and passions may subside. It has not been suggested that this election resulted in the choice of a surveyor who was not entirely competent, and did not possess every requisite qualification for the duties of the position. But it has sometimes happened that in haste, and under the influence of prejudice, very important offices have been filled, not only by very incompetent, but by very bad men.

It has not been thought necessary to incumber this opinion with quotations from the authorities bearing on this question. They are overwhelmingly preponderant in favor of the position of the defendant, and have been marshalled with great ability in his counsels' original and supplemental briefs. Indeed, in this connection, the court have pleasure in acknowledging the benefit they have derived from the careful, skillful and thorough preparation of this cause by the counsel for both the parties. A single remark in regard to each of the cases of *Commonwealth v. Swift*, 4 Whart. 186; *Broom*,

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v. *Hanley*, 9 Barr. 513, and *Commonwealth v. King*, 4 Norris, 103, needs only to be made. The only point ruled in the first was, that the Constitution of 1838 did not create a vacancy in the office of recorder of deeds, and that the power remained in the governor to appoint under the Constitution of 1790 until the general election in 1839. In the second, it was decided that the death of a person elected to fill the office of clerk of the Orphans' Court before he had qualified himself, according to law, did not create a vacancy, but the incumbent, who was commissioned to fill the office until his successor should be qualified, held over. In the third case, the sheriff of McKean county died about three weeks before the general election of 1875, in the third and closing year of his term; and as the people of the county could have devoted the whole of the three years to preparation for the election of his successor, it was held of course, that the appointee of the governor could retain the office only to the time when the new term began in January 1876. Nothing decided in either of those cases touches the points in issue here.

The judgment of ouster is reversed at the costs of the relator, and it is now ordered, adjudged and decreed that judgment on the demurrer in favor of the defendant be forthwith entered, and it is further ordered, adjudged and decreed that the said defendant recover his costs of said relator, to be levied by execution, as in cases of debt.

Judgment reversed.

Justices MERCUR and GORDON dissented.

NOTE BY THE REPORTER.—At the last general election in New York an amendment to the Constitution was adopted, by which an additional justice of the Supreme Court of the Second Judicial District was provided. The question arose whether the governor can appoint an incumbent to hold until the next election. The answer depends on the question whether there is a present "vacancy," i. e., whether a "vacancy" can occur in an office which has never been filled. The attorney-general pronounced an opinion in the affirmative. He said the question has never been judicially determined in this State, and citing the principal case, said it is sustained by *Stocking v. State*, 7 Ind 329; *Collins v. State*, 8 Id. 344; *Biddle v. Willard*, 10 Id. 63; *People v. Parker*, 37 Cal. 650; *State ex rel. Attorney-General v. Irwin*, 5 Nev. 111; *State v. Adams*, 2 Stewart (Ala.), 231; *Gormley v. Taylor*, 44 Geo. 79; *Giles v. Russ*, 49 Id. 115; *Dill. on Mun. Corp.* 161, note 4.

In *Stamm v. Dixon*, Supreme Court of Wisconsin, May 11, 1880, the meaning of "vacancy in office" was passed upon. The statute declares that "whenever the office of any justice of the peace shall become vacant by resignation, removal or otherwise," the justice to whom the books and papers of such former justice shall be delivered shall proceed to try the cause. It was held that this includes the case of one who ceases to be justice by reason of the expiration of his term. The court said: "We cannot think that the legislature would have been so solicitous to preserve the right of a party to an action pending

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and undetermined before a justice, when he should die, remove out of his town, be removed from office, or resign, before the expiration of his term, to have the same continued and tried before his successor in office, or other justice into whose hands the docket of such justice should be delivered, and yet have intended that when the vacancy occurred by the expiration of his term, an event which would occur much more frequently than the other, the justice to whom he delivered his books and papers, as required by said section 243, should have no power to proceed in any action which remained undetermined on the docket of such predecessor. It is true that a vacancy in an office does not occur by the expiration of the term of office for which the officer who fills the office was elected, within the meaning of the statute which provides for the filling of vacancies in office by the appointment or election of another to fill such vacancy; but we think it is clearly within the meaning of the word 'vacant,' as used in this statute, that the office of any particular justice of the peace does become vacant when the term for which he was elected expires, and he is not elected his own successor. Such has been the uniform construction of this statute since the adoption of the Revised Statutes of 1849. If the word 'vacant,' as used in said section 243, does not cover the case of the termination of the office of the justice by the expiration of his term of office, then there never has been, and is not now, any law of this State which authorizes a successor in office of any justice of the peace, who has held his office until the expiration of the term for which he was elected, to hear, try and determine any action which might have been pending and undetermined upon the docket of his predecessor at the time his term of office expired, and all such actions would abate absolutely when such term expired. The uniform construction of this statute to the contrary, for more than thirty years, without question, is conclusive with us that it should receive the liberal construction contended for by the learned counsel for the appellants, and that such construction is one which the legislature very clearly intended it should receive." "As said above, the meaning of the words 'vacancy in office,' when used in the Revised Statutes of 1878, as defined by the statute for the purpose of declaring when such vacancy may or shall be filled by appointment or election, does not apply to or cover the case of the vacancy which occurs by reason of the expiration of the term for which the officer was elected or appointed. There is no vacancy in an office so long as those elected serve their full term, and a successor is elected and qualifies as provided by law; but as to each individual officer who serves out his term and is not re-elected, his office ceases and becomes as to him vacant, and it is in this latter sense that the word is used in the sections above referred to. The vacancy spoken of is the vacancy of the office of the individual justice, and not in the office itself. The language used in section 8591 is: 'Whenever the office of any justice shall become vacant for any cause.' This language clearly refers to the office of an individual justice, and not to the office itself. When, therefore, the office of any justice expires it is a vacancy as to him, and comes within the meaning of the language used. If, in any case, the words 'vacant' or 'vacancy' can be applied to the case of the expiration of the term of office of an individual officer, these words are clearly broad enough to cover that case."

LANCASTER FIRE INSURANCE COMPANY V. LENHEIM.

(89 Penn. St. 497.)

Insurance — on stock of goods — condition against keeping explosive fluids.

A fire policy insured a stock of "general merchandise of all kinds usually kept in a country retail store," "except as hereinafter provided." Immediately following this was an exemption from liability for loss where "turpentine or benzine" were deposited, stored, kept, or used, without written

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consent on the policy. The insurance clause was written; the exempting clause was printed. The insured kept for sale both turpentine and benzine without such consent. *Held*, that the policy was void, although those articles might be part of the merchandise usually kept in such stores. (*See note, p. 781.*)

ACTION on a fire policy, the conditions and provisions of which are set out in the opinion. The insured kept for sale both turpentine and benzine, without the consent of the insurer. The plaintiff had judgment below.

W. H. & H. C. Jessup, for plaintiff in error.

Little & Blakeslee, for defendants in error. Where the policy describes the insured as engaged in a certain trade or business, it has been held that he is permitted, by implication of law, to keep and use all articles necessary for the customary carrying on of such trade, although such goods are classed as extra-hazardous. 2 Pars. on Cont. 424. The plaintiff in error concedes this well-settled principle as to trade descriptions, but justifies it on the ground of the necessity to support the trade. The same principle rules our case. If the writing insures by describing a trade, the general words in writing include all articles used in that trade, and no exceptions in print will prevail, because repugnant. *Franklin Fire Ins. Co. v. Updegraff*, 7 Wright 352; *Pindar v. Kings County Ins. Co.*, 36 N. Y. 648; *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray 359; *Flanders on Fire Ins.* 81; *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124. *Birmingham Ins. Co. v. Kroegher*, 83 Penn. St. 64; s. c., 24 Am. Rep. 147 is distinguishable from this case. In that case the written stipulation was for an insurance on "stock of merchandise contained in store." The printed terms prohibited the keeping of carbon oils, etc. It being shown such oil was stored and kept, of course it was held fatal. "Stock of merchandise contained in store," are not words descriptive of a class of goods. It was argued that the word *merchandise* meant such as is usually kept in a country store, and here is where the case failed. They asked to have implied what we have expressed.

GORDON, J. The policy, which forms the foundation of this suit covers a stock of "general merchandise of all kinds usually kept in a country retail store." The insurance is "against all immediate

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loss or damage as may occur by fire to the property specified, not exceeding the sum insured nor the interest of the assured in the property, EXCEPT as hereinafter provided." Then, in immediate connection with the clause containing the above, comes the condition that the company shall not be held liable, unless by special consent in writing indorsed thereon, for any loss "where gunpowder, phosphorus, saltpetre, naphtha, BENZINE, camphene, TURPENTINE, burning-fluid, spirit-gas, crude, coal or earth oils, or petroleum, or any other articles subject to legal restriction, are deposited, stored, kept or used." It will thus be seen that this stock of general merchandise was insured, subject to certain exceptions and conditions in said policy specified, neither can it be justly said that care was not taken to call attention to these exceptions and conditions for the word "except" is printed in large, and the words "benzine" and "turpentine" in small capitals. Besides this, the policy was originally taken in the name of Lewis S. Lenheim, and was transferred to the plaintiffs, subject to the conditions therein contained; the usual complaint, therefore, of small print and want of notice does not apply in this case. The contract of the parties, then, is very easy of comprehension. The company agreed to insure for Lenheim & Co. this stock of general merchandise of all kinds usually kept in a country store, excepting certain articles therein specified, among others turpentine and benzine, of which it is said, if these are kept the policy shall be void. The policy was accepted under and subject to these conditions, and it is now produced in order to charge the company. May the defendant plead these conditions or may it not? There is no proof of fraud, by it or its agents, whereby it might be estopped, and the conditions are part and parcel of the consideration of the policy. In consequence of them the plaintiffs obtained their insurance at rates less than they otherwise could have done. The excepted articles are extremely dangerous; there is good reason why they should be so excepted, and there is therefore nothing unreasonable in the condition that the policy should be forfeited upon the willful violation of that condition.

But the court below says, "By the written portion of the policy, the insurance was on the general stock of merchandise of all kinds usually kept in a country store. The prohibitory clause in the policy is repugnant to this and cannot be interpreted so as to pre-

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vent a recovery, if you find these articles were part of all kinds of merchandise usually kept in a country store."

Herein, however, is the error in supposing there is any repugnancy between the written and printed parts of the policy. There is certainly no repugnancy in agreeing to insure a general stock of merchandise subject to the condition that gunpowder, petroleum, turpentine and benzine shall not form part of such stock. Surely there is nothing so unusual in reservations and conditions in contracts as to make them the subjects of unusual construction or of extraordinary consideration. Surely, without repugnancy one may contract for the sale of a plantation of one hundred acres of land reserving thereout ten acres. Or suppose the contract in controversy to be for the sale of this general stock of merchandise, excepting the articles above mentioned, could any one doubt but that the exception was good?

This case is as nearly like that of the *Insurance Co. v. Kroegher*, 2 Norris, 64; s. c., 24 Am. Rep. 147, as two cases can be. There, as here, the insurance was upon a general stock of merchandise, but we held that the violation of a condition, which provided that petroleum should not be kept, avoided the policy. In that case all the authorities now cited by the plaintiffs below were adduced, and there is nothing now proposed of such a character as to require us to go over the ground anew. We have only to add, that if the plaintiffs' own evidence was true, they had on hand, at the time of the fire, turpentine enough to avoid the policy. The benzine might, on the principle *de minimis*, be disregarded, since eight or ten small vials of it was a quantity so trifling as not to be worth attention.

As what we have said, in effect sustains all the assignments of error, we need not speak of them *seriatim*.

Judgment reversed, and a *venire facias de novo* ordered.

Judgment reversed.

NOTE BY THE REPORTER.—This decision we think is opposed to the weight of authority.

The *Kroegher* case is correctly distinguished by counsel in his argument above quoted.

In *Citizens' Insurance Co. v. McLaughlin*, 53 Penn. St. 485, the insurance was of a patent leather manufactory. The policy permitted five barrels of benzine in a detached shed, but classed oils among hazardous and prohibited risks. The court said: "The company could not have expected" the business "to be suspended, nor to be carried on in any other than the customary modes." "The words of the policy descriptive of the subject-matter of the insurance are 'the buildings of their tannery and patent leather manufactory,' and it must be intended that these words included whatever, not expressly excepted, was necessary and essential in conducting such a business." Citing the *Harper* case.

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In *Franklin Fire Insurance Co. v. Updegraff*, 43 Penn. St. 350, the insurance was on merchandise such as is usually kept in country stores. Hardware, china, glassware, looking-glasses, etc., were classed in the policy among hazardous risks to be inserted in the policy or the policy would be avoided. Held, that they were covered, if usually kept in country stores, and this was a question of fact.

In *Steinhach v LaFayette Fire Insurance Co.*, 54 N. Y. 90, the court said, by REXFOLDS, C.: "The plaintiff was insured for one year against fire, on his stock of fancy goods, toys and other articles in his line of business, in his store in the city of Baltimore, in his occupancy as a German jobber and importer, and he was privileged to keep fire-crackers on sale. It was provided in the policy that if the premises should be used for the purpose of carrying on therein any trade or occupation, or of storing or keeping therein articles, goods or merchandise denominated hazardous or extra-hazardous or specially hazardous, in the second class of hazards annexed to the policy, except as therein specially provided for, or thereafter agreed to by the defendant, in writing upon the policy, then so long as the same shall be so used the policy was to be of no effect. The policy of insurance was accepted by the plaintiff with the condition last referred to, and the privilege to keep 'fire-crackers on sale' was specially written in the policy, and added ten cents more of premium to the \$100. 'Fire-works' are claimed as 'specially hazardous,' and added fifty cents or more per \$100 to the rate of insurance, and it is claimed that to be covered by the insurance, must have been specially written in the policy, which, in this case, was not done. The rule which prevails in the interpretation of contracts of insurance is or should be the same as in all other written contracts of whatever nature. The intent is to be ascertained and observed, and if it clearly appears by the writing, the contract must have effect according to its terms. In this case, without evidence *alunde*, it would be difficult, if not impossible, to say what articles in fact were intended to be insured. The court cannot judicially take notice of the precise commodities which make up a stock of fancy goods, toys, and other articles in that line of business, nor can it be declared as a legal proposition, what precise things pertain to the occupancy of a building in the city of Baltimore as a 'German jobber and importer.' In the prosecution of his business the plaintiff did keep 'fire-works,' and the loss was occasioned by their accidental ignition, and it appears to have been absolutely necessary, in order to settle the dispute between the parties, to ascertain whether the keeping of 'fire-works' for sale was 'in the line of plaintiff's business.' If not, it is very clear they were not insured against, because they were not specially 'written in the policy,' and the fact that the privilege to keep 'fire-crackers on sale' was specially written in the policy, affords a very strong argument in favor of the defendant that 'fire-works' were not insured against, for there was no special writing in regard to them, unless included in the written words 'in the line of the business' of the plaintiff. I do not understand it was claimed by the counsel for the defendant, on the trial, that the plaintiff was not at liberty to show that keeping 'fire-works' for sale was in the line of the plaintiff's business. It was in fact shown, without objection, that he had always kept them as a part of his stock in trade, and had some on hand when the insurance was effected. Evidence was also given, on the part of the plaintiff, tending to show that similar dealers usually kept fire-works as a part of their stock in trade. Evidence on the part of the defendant was given tending to show the contrary, but it was not very conclusive. If, therefore, as a matter of fact, the keeping of fire works was in the line of the plaintiff's business, the cases are quite too numerous and familiar to need citation, that 'fire-works' were embraced in the written description of the property covered by the policy."

JOHNSON, C., said: "Under the condition in the policy, suspending its operation so long as the premises should be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein, any articles, goods or merchandise, denominated hazardous or extra hazardous or specially hazardous, in the second class of the classes of hazards annexed to the policy, except as therein specially provided for or thereafter agreed to by the corporation in writing upon the policy, it is the settled law of this State, that any such article is specially provided for, if it, as matter of fact, enters into and forms a part of the kind or line of business specified in the written part of the policy in the description of the risk assumed. The insurers being bound to know the nature and kind of articles belonging to the business and occupations against the risks of which they undertake to insure, the specification of the business is a sufficient special provision for all the articles belonging to

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it under the condition in the policy, even though some of those articles belong to the second class of hazards mentioned in the condition. *Harper v. Albany M. Ins. Co.*, 17 N. Y. 194, *Harper v. N. Y. City Ins. Co.*, 23 id. 441."

"In conclusion it is proper to advert to the decision in *Steinbach v. Insurance Co.*, 13 Wall. 183, in which a different construction was placed upon similar terms in another policy in favor of the plaintiff here. The New York cases do not seem to have been adverted to, nor the case itself much considered. We should not be justified under these circumstances, in abandoning a settled line of decision in our own State in order to conform to it."

The facts in *Steinbach v. Insurance Co.*, above cited, were the same as in the New York case, and the decision was exactly the reverse. The court simply said: "It is not pretended that fire-works are included under the name of fire-crackers. But the plaintiff contends that they are included in the description of 'other articles in his line of business.' The answer to this is that the policy itself requires that fire-works shall be specially written in it. They are among the goods described as specially hazardous, and add 50 cents on the \$100 to the ordinary rate of insurance. It is impossible to think that they are described by the general terms used in the policy. The insurance was at the ordinary rates. There can be no doubt that the evidence was properly rejected." No authorities were cited. Mr. Wood says this is in conflict with all the better class of cases. *Fire Ins.*, 370, note. The doctrine of the New York case is reiterated in *Hall v. Insurance Co. of North America*, 58 N. Y. 292.

In *Whitmarsh v. Conway Fire Ins. Co.*, 16 Gray, 850, the insurance was on a "stock in trade, consisting of the usual variety of a country store, except dry goods," with "permission to keep and sell burning fluid and gunpowder," and provided that if certain enumerated articles, denominated hazardous, extra-hazardous, and risks prohibited, were kept on the premises, the policy should be void, unless they were specially provided for. *Held*, that the keeping of some of such enumerated articles did not avoid the policy, they being such as are usually kept in a country store, and that parol evidence was admissible to prove that fact. The articles in question were oil, friction matches, glass and earthenware. This followed *Elliott v. Hamilton Mutual Insurance Co.*, 13 Gray, 130, where the insurance was on "goods usually kept in a country store," and the prohibition was of "cotton or woolen waste or rags." *Held*, not to cover clean, white cotton rags, if usually forming part of the stock of a country store. (The mere description of the premises as "a provision and grocery store," would not, however, outweigh an express prohibition. *Whitmarsh v. Charter Oak Ins. Co.*, 2 Allen, 581.)

In *Niagara Fire Ins. Co. v. DeGraff*, 12 Mich. 124, the insurance was on a stock of "groceries," with an exception of alcoholic liquors, unless specially provided or agreed to in writing on the policy. *Held*, that the liquors were covered if the jury should find them to be "groceries." The court said: "By the use of a term including them they are 'specially provided for in writing on the policy.' Insuring a class of goods includes what is usually contained in it, whether extra hazardous or not." Citing the New York *Bryant* and *Harper* cases.

In *Viele v. Germania Insurance Co.*, 26 Iowa, 9, the company consented to the use of the insured premises as a manufactory of window shades, in the conduct of which business benzine was necessarily used. The policy prohibited the keeping of benzine. But it was held that the policy was not avoided. The court said: "The consent to the manufacture of the window shades implied a consent to the use of benzine if it was necessary or commonly used in making those articles; otherwise a direct permission to continue the manufactory would be defeated by the prohibition in the policy." This is founded on the *Harper* and *McLaughlin* cases.

In *Phoenix Insurance Co. v. Taylor*, 5 Minn. 492, the insurance was "on a stock of goods consisting of a general assortment of dry goods, groceries, crockery, boots and shoes, and such goods as are usually kept in a general retail store." By a printed clause the keeping of gunpowder was prohibited unless especially consented to in writing on the policy. It was held that the written portion prevailed over the printed, and that the written words would authorize the keeping of gunpowder, it being proved that it was usually kept in general retail stores. The court said: "In the interpretation of such instruments it is always to be kept in sight, that the main portion of the policy, with all its conditions and restric-

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tions, is in a printed form, intended to be sufficiently general to meet all cases, and prevent the necessity for drawing a policy for each risk taken, which would very much retard and embarrass the transaction of such business, and that the written part, inserted by the parties, is more immediately expressive of their meaning and intention concerning the contract they are entering into, than the printed portion. There is a rule of construction, therefore, applicable to such instruments, which gives to the written portion of them controlling force, when there is any conflict or want of harmony between it and the printed stipulations. Ang. on Ins., §§ 14, 15." "All such articles are just as clearly embraced in the policy as if each article thus necessarily used was enumerated at length. Insurance companies must be deemed to be familiar with the materials necessary to the carrying on any trade or business, the 'stock in trade' of which they insure, and in issuing the policy they must be deemed to have intended to include all such materials in the risk." Citing the *Harper* case.

In *Archer v. Merchants and Manufacturers' Ins. Co.*, 43 Mo. 434, the insurance was on a wagonmaker's shop and materials, with a printed prohibition of benzine. The insured kept benzine in a paint shop in the same building. The same doctrine was held as in the last case, following the New York cases.

There is a dictum to the same effect in *Leggett v. Ins. Co.*, 10 Rich. 202.

In *Collins v. Carmville Ins. and Banking Co.*, 79 N. C. 219; a. c., 28 Am. Rep. 322, the insurance was on a stock of "drugs and medicines," with a prohibition of gunpowder, fire-works, saltpetre, etc. Held, that this did not extend to saltpetre kept as a drug.

It therefore seems that the principal case is utterly opposed to the decisions in all the other States, and that it is quite difficult to reconcile it with previous decisions in the same State. We think the matter can be tested thus: Suppose the written clause had insured all the usual articles of the stock of a country store, specifically naming them all, and including turpentine and benzine, and then in the printed portion had excepted and prohibited turpentine and benzine, would it be contended that the insurance did not cover turpentine and benzine? In the policy in question turpentine and benzine were as effectually included in the written clause, if they form part of the usual stock of a country store, as if they had been specifically named.

RICHARDSON V. CLEMENTS.

(80 Penn. St. 503.)

Deed — reservation — "process of forcing water" — windmill.

Under a reservation in a deed of the right to "a supply of spring water by means of a hydraulic ram, wheel, or other process of forcing water," the party entitled may substitute a wind-mill for a wheel previously used.*

TRESPASS *quare clausum fregit*. The opinion states the facts. The defendant had judgment below.

Pencoast, for plaintiff in error. The clause in the deed is a reservation or exception, and must be construed most strongly

* Compare *Onthank v. Lake Shore, etc., R. R. Co.* (71 N. Y. 194), 27 Am. Rep. 85.

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against the grantor and most favorably to the grantee. *Whitaker v. Brown*, 10 Wright, 199; *Trout v. McDonald*, 2 Norris, 144; *Bullen v. Denning*, 5 B. & C. 842; *Dann v. Spurrier*, 3 B. & P. 399; *Barnes v. Burt*, 38 Conn. 541.

When, in pursuance of a grant or reservation of a right to an easement, such easement has been located and defined, the right is exhausted, and the owner of the dominant tenement cannot make a material change in the location or character of the easement. *Galloway v. Wildner*, 26 Mich. 97; *Fitzhugh v. Raymond*, 49 Barb. 646; *Hull v. Fuller*, 4 Vt. 199; Wash. on Easements, § 3, p. 22; *Moorhead v. Snyder*, 7 Casey, 514.

The words "or other process," immediately following the words "hydraulic ram, wheel," are to be construed as referring to things of the same kind as those particular words, that is, a process of which water should be the motive power. No process in which wind, steam, or any motive power other than water was intended or thought of by either of the parties to the deed. Where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned. Sedgw. on Statutes, 423; *Sandiman v. Breach*, 7 B. & C. 96; 14 E. C. L. Rep. 22; *Rawlings v. Jennings*, 13 Ves. 39; *Cavendish v. Cavendish*, 1 Br. Ch. R. 467; *Ingell v. Nooney*, 2 Pick. 365; 13 Am. Dec. 434; *Bellany v. Bellany*, 6 Fla. 62.

C. H. Stinson, for defendant in error.

MERCUR, J. This is a case stated. The parties own adjoining lands. Both properties were formerly owned by a Mr. Hallowell. While thus the owner of the whole he put in a hydraulic ram, on that portion of the land now owned by plaintiff, and thereby supplied with spring water his mansion-house on the land now owned by the defendant. He conveyed the whole property to Mrs. Butler. She continued for some time to use the hydraulic ram to force the water to her house; but afterward substituted a water-wheel in place of the ram. While thus procuring the water by means of the wheel, she conveyed about twenty acres of the land to one McNulty, from whom plaintiff acquired title. On the part conveyed was situated the farm-house, spring-house, poultry-house, and a large barn. She retained about seventeen acres, on which were the mansion-house, stone barn, stables, gardener's house and green-

house. The deed which she executed to McNulty contains the following clause: "subject nevertheless to the right and use by the said Gabriella M. Butler, her heirs and assigns, of a supply of spring water, by means of a hydraulic ram, wheel, or other process of forcing water to the said Gabriella M. Butler's premises; together with the free ingress, egress, and regress, to and from a certain pond, on the premises hereby conveyed, for the purpose of keeping up the same, and making all necessary repairs thereon, so that a supply of water may at all times be had; and of taking ice therefrom when it first freezes of sufficient thickness suitable for filling the ice-house on the premises of said Gabriella M. Butler, her heirs and assigns." After her sale Mrs. Butler continued to use the water-wheel until she conveyed to the defendant. He has continued to procure the water by the same process. He has established on the premises "a family or private boarding school." Now he has entered on the premises of the plaintiff with workmen "to remove the water-wheel, and in place of it, and on the site thereof, to build and erect a wind-mill, with which, using wind as a motive power, he would supply his premises with water from the plaintiff's premises."

The question is whether, under the reservation in the deed, the defendant can enter on the premises of the plaintiff for the purpose mentioned and substitute a wind-mill in place of the water-wheel? The court below was of the opinion the defendant had that right, and entered judgment in his favor on the case stated.

It may be conceded, when the language making an exception or reservation in a deed is doubtful, it should be construed more favorably to the grantee. It is only when it is doubtful, that this rule can be applied. It has no place when the language is sufficiently clear to define the character and extent of the exception or reservation. How is it in the present case?

An agreement is the assent of two minds to the same thing. It should be construed in the light of existing facts and circumstances under which the parties entered into it. It should be so interpreted as to effect the objects in respect to which the parties proposed to contract. What then were the circumstances when this contract was executed? The main object to be secured and protected was a supply of water. It was essentially necessary for a proper enjoyment of the premises which she retained. While she owned the whole property she had put in and used such forcing power as she

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saw proper. The hydraulic ram had proved unsatisfactory to her, and she had substituted a water-wheel. She was uncertain whether that would continue satisfactory. She was unwilling to limit the exercise of her right to the use of the wheel; nor if she changed it, did she wish to be compelled to return to the ram. She desired to be untrammelled as to any precise process in forcing the water. She was unable or unwilling to name all the different mechanical powers by which she might obtain the water. With all these objects in view, the conveyance declares that it is subject "to the right and use of Mrs. Butler, her heirs and assigns, of a supply of spring water." The method of procuring it may be "by means of a hydraulic ram, wheel, or other process, of forcing water." The primary and ultimate end of the reservation is stated nearer the closing part of the contract in these words, "so that a supply of water may at all times be had." To secure this end, not only either of the methods already tried might be employed, but also "other process of forcing water." A perpetual supply of water was to be reserved. The language used indicates no intention to deny the use of such improved process as science may discover or mechanical ingenuity invent for forcing water. It may not be an injurious or offensive process not contemplated in the reservation. The windmill is not averred to be either the one or the other; nor that it works any substantial injury to the plaintiff, either by occupying a larger quantity of land, or by taking an increased volume of water. The question is simply, whether a windmill is itself outside of the "other process" reserved? We think it is not. The learned judge was correct in entering judgment in favor of the defendant.

Judgment affirmed.

WOODWARD, J., dissented.

KANE V. COMMONWEALTH.

(89 Penn. St. 522.)

Constitutional law — power of jury as to law in criminal case.

Under the Pennsylvania Bill of Rights, the jury, in a criminal case, have the power, and consequently the right, to render a verdict contrary to the instructions of the court upon the law. (*See note, p. 791.*)

CONVICTION of illegal sale of intoxicating liquors. The opinion states the case.

George N. Corson and George W. Bush, for plaintiff in error.

J. Wright Apple, for the Commonwealth.

SHARSWOOD, C. J. [Omitting a minor question.] We are of opinion that the learned judge committed an error in declining to affirm the defendant's third point, that the jury in the case were judges of the law and the facts. He admits that the law was as stated in the point until the Constitution of 1873, and the legislation in pursuance of it, gave the defendant in criminal cases a writ of error to the Supreme Court. We cannot agree that in consequence of the provisions these reasons which led to the adoption of the doctrine ceased—and that it has ceased therefore to be the rule.

I do not propose an elaborate examination of the question. I find it done to my hand in a very learned and exhaustive opinion of Mr. Justice HALL, of the Supreme Court of Vermont, in *State v. Croteau*, 23 Vt. 14, who traces the doctrine historically, and cites and comments upon all the cases, both English and American. There is a great variety of opinion in the courts of the United States and of the several States. While all concede that under the provisions of the Bill of Rights no man shall be twice put in jeopardy of life or limb for the same offense, that when the jury find in favor of the prisoner a verdict of not guilty it is final, it not being in the power of the court to grant a new trial on the motion of the Commonwealth and against the prisoner's consent, or of any higher court to reverse the judgment—it has been strongly contended that though the jury have the power they have not the right to give a verdict contrary to the instruction of the court upon the law; in other words, that to do so would be a breach of their duty and a violation of their oath. The distinction between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do any thing has the legal right. No court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded. They may present to them the obvious considerations which should induce them

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to receive and follow their instruction, but beyond this they have no right to go. The argument in favor of their taking the law from the court is addressed very properly *ad verecundiam*. The court is appointed to instruct them and their opinion is the best evidence of what the law is. For my part I consider the following passage from the charge of Mr. Justice BALDWIN in the *United States v. Wilson*, Bald. 99, as a model to be followed by other judges when called on to instruct the jury upon the subject: "We have thus stated to you the law of this case under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and if you should feel it your duty to differ from us, you must find your verdict accordingly. At the same time it is our duty to say, that it is in perfect accordance with the spirit of our legal institutions that courts should decide questions of law and the juries of fact; the nature of the tribunal naturally leads to this division of duties, and it is better for the sake of public justice that it should be so; when the law is settled by a court there is more certainty than when done by a jury; it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject; by taking the law as given by the court you incur no moral responsibility; in making a rule of your own there may be some danger of a mistake."

No one acquainted with the life of the founder of this Commonwealth can entertain any doubt of his opinion or that of his friends and followers. In 1670, William Penn, with George Meade, was tried under an indictment for seditiously preaching to a crowd in Grace Church street, before the Recorder of London, who charged the jury that the court was the sole judge of the question of sedition, and that all they had to do was to find whether the defendants had preached or not. As this was not denied, it was a binding instruction to find for the Crown. The jury, however, acquitted the prisoners, and the court, considering it as a contempt, set a fine of forty marks on each of the jurors. Edward Bushel, one of them,

refused to pay the fine, and being arrested, sued out a writ of *habeas corpus* before Lord Chief Justice VAUGHAN, who without hesitation discharged him from his illegal and arbitrary imprisonment. Vaughan, 135. In 1735, on the trial of John Peter Zenger, for a libel against the government, before Chief Justice DELANCEY, of New York, Andrew Hamilton, of Pennsylvania, certainly the foremost lawyer of the colonies, in a forensic effort in defense of the prisoner, equal to that of Erskine afterward in the case of the Dean of St. Asaph, not only took the ground that the jury had a right to say whether the publication was a libel, but added in the most emphatic language, "I know that they (the jury) have the right, *beyond all doubt*, to determine both the law and the fact; and when they do not doubt of the law they ought to do so." 17 State Trials, 675. The jury in that case, contrary to the charge of the court, returned a verdict of not guilty. The corporation of the city of New York passed a vote of thanks to Mr. Hamilton for his able and eloquent defense of "the rights of mankind and of the liberty of the press," and the freedom of the city was presented to him in a gold box. When Lord MANSFIELD and his associates, in *King v. Woodfall*, 5 Burr. 2661, and *King v. Withers*, 3 T. R. 428 n., undertook to enforce a similar doctrine in England, Parliament, by a declaratory statute (Mr. Fox's bill), 32 Geo. 3, chap. 60, settled the law to be that it should be competent for the jury in all cases of indictment or information for libel, to give a verdict of guilty or not guilty upon the whole matter put in issue, but that the court should, according to their discretion, give their opinion and direction in like manner as in other criminal cases. It was in view of this controversy that the framers of the Constitution of 1790, in art. 9, § 7, expressly declared "that in all indictments for libel, the jury shall have a right to determine the law and the fact, under the direction of the court, as in other cases."

In the judicial system of this Commonwealth, from the earliest period to the present time, the tribunals invested with criminal jurisdiction, with few exceptions, have been composed of a majority of judges not required to be learned in the law. That this majority can overrule the president upon questions of law has never been doubted. And there is more than one case reported in our books in which they have done so and been sustained by this court. If the doctrine now contended for be sound, the jury in a criminal case are absolutely bound by the opinion of the two associate

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judges, though contrary to their own clear conviction and that of the president.

The power of the jury to judge of the law in a criminal case is one of the most valuable securities guaranteed by the Bill of Rights. Judges may still be partial and oppressive, as well from political as personal prejudice, and when a jury are satisfied of such prejudice it is not only their right but their duty to interpose the shield of their protection to the accused. It is as important in a republican as any other form of government, that, to use the language of the Constitution of 1776, "in all prosecutions for criminal offenses," a man should have a right "to a speedy public trial by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty." The provision of the Constitution of 1873, that "in all cases of felonious homicide and in such other criminal cases as may be provided for by law, the accused, after conviction and sentence, may remove the indictment, record and all proceedings to the Supreme Court for review." Art. 5, § 24, is evidently a very inadequate substitute for the constitutional guarantee expressly declared and reaffirmed in the same instrument. Art. 1, §§ 6, 7, 9.

Judgment reversed and venire facias de novo awarded.

NOTE BY THE REPORTER.—DR. WHARTON remarks upon this case, 5 So. Law Rev. 385:

"The first impression we gather, on reading the opinion before us, is that it is in conflict with what has heretofore been the prevalent view of our American courts on this important issue. There are, it is true, States (e. g., Maryland, Louisiana, Illinois, Indiana and Georgia) in which there is an express constitutional provision that juries in criminal cases are to be judges of the law. Yet even in these States we are constantly told that, while the jury have the power to find a verdict against the instructions of the court, yet they are bound to accept the law which the court gives them by way of instruction. Thus, in a late case in Illinois (*Mullinex v. People*, 76 Ill. 211), the defendant asked the court below to charge the jury that they 'were the sole judges of the law.' The court, however, in charging the jury, told them that it was their 'duty to accept and act upon the law as laid down to you by the court, unless you can say, upon your oaths, that you are better judges of the law than the court.' This charge the Supreme Court held to be eminently proper. In Louisiana, under a similar constitutional provision, the jury are told that, while they have the power, they have not the moral right to reject the opinion of the court. *State v. Tally*, 23 La. Ann. 677, and the same distinction is applied in Georgia, where it has been recently ruled, under a similar constitutional limitation, that it is the duty of the jury to take the law from the court. *McMath v. State*, 55 Ga. 203.

"In States whose Constitutions contain no specific provisions in this relation, we find the same rule laid down, it being held that the jury are no further judges of the law than is implied in the fact that if they acquit against the law, the acquittal cannot be reviewed by the court. Such is the view taken in the courts of Maine, New Hampshire, Massachusetts, Rhode Island, New York, Virginia, North Carolina, Ohio, Kentucky, Alabama, Mississippi, Missouri, Arkansas, California, South Carolina and Texas. The authorities for the statement in this text will be found in the seventh edition of my book on Criminal Law, § 827. As more recent cases, may be cited, *State v. Buckley*, 40 Conn. 246; *Adams v. State*, 29 Ohio St. 410;

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People v. Anderson, 44 Cal. 65; *State v. Jaeger*, 66 Mo. 173; *State v. Gustave*, 27 La. Ann. 395; *United States v. Anthony*, 11 Blatchf. 200. In the Federal courts, such is the prevailing opinion. *United States v. Fenwick*, 4 Cranch C. Ct. 675; *United States v. Baptiste*, 2 Sumn. 243; *United States v. Morris*, 1 Curt. 43; *United States v. Riley*, 5 Blatchf. 204; *United States v. Greathouse*, 4 Sawyer, 439; 2 Abb. (U. S.) 364. Judge STORY sustained this conclusion with even more than his usual eloquence. *United States v. Baptiste*, *ut supra*, and Judge THOMPSON, one of the most eminent and experienced members of the same court, expressed it in terms which are as emphatic as they are terse. He was asked to charge the jury that they were the judges of the law. His answer was, 'I shan't; they ain't.'

"It is not to be supposed that Chief Justice SHARSWOOD, in the opinion before us means to dissent from the opinions thus almost universally accepted in this country. In fact, we have a right to conclude otherwise from the appeal he makes to the authority of the late Judge BALDWIN. We must take the opinions of Judge BALDWIN, when we invoke his authority, with the qualifications he himself imposed. When he said, in *United States v. Wilson*, that the jury are judges of the law in criminal cases, he meant judges of the law under the direction of the court; and so he was careful subsequently to declare."

"Were the opinion before us meant to overrule the prior utterances of the Pennsylvania courts, it would have so been declared; but so far from this being the case, it is assumed by the chief justice that these conclusions are simply an expansion of the view that has always obtained in Pennsylvania."

See remarks on *Susan B. Anthony's* case, 8 Alb. L. J. 201; 10 id. 83. In the latter it is said: "May the judge order a verdict of guilty, where there is no dispute about the facts, and these facts indicate a clear infraction of the law in question? We confidently say he cannot. It is still a question for the jury, and although they would morally be bound to convict, yet they have the power to acquit."

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

STEPHENS V. SHAFER.

(48 Wis. 54.)

Surety — evidence — judgment against principal in bond.

A judgment against the principal obligor in an official bond, showing upon its face that it was recovered for a breach of the conditions, is *prima facie* evidence of the plaintiff's right to recover against the sureties, and of the amount of such recovery, although they had no notice of the action. (*See note, p. 802.*)

ACTION on a bond. The plaintiff, as sheriff of Winnebago county, appointed Stephen W. Race one of his deputies, and took from him a bond, with Shafer and W. W. Race, the appellants, as his sureties. The bond was joint and several, and was conditioned "that Stephen W. Race should well and faithfully in all things perform and execute the duties of the office of deputy sheriff of the county of Winnebago, during his continuance in office as deputy sheriff, without fault, deceit or oppression, and should pay over all money that might come into his hands as such deputy sheriff which might be so required by law."

An action had been brought against the sheriff to recover the amount of an execution issued upon a judgment rendered in a justice's court, which had been placed in the hands of his deputy, Race, and which he had failed to collect; and in that action a recovery was had against the sheriff, on the ground of negligence

on the part of the deputy in not levying upon the property of the defendant in the execution, he having sufficient to satisfy the same, and that afterward the execution debtor went into bankruptcy, and the plaintiff was unable to collect his debt. Of this action the deputy, Race, had notice, and appeared and defended the same at his own expense.

After judgment in that action, the sheriff commenced the present action upon the bond of the deputy. Upon the trial, the judgment, upon which the execution was issued and placed in the hands of Race, was admitted. The plaintiff offered in evidence the execution issued upon such judgment, together with the return of deputy Race thereon, "that after using due diligence and making diligent search, he was unable to find any personal property wherewith to satisfy the execution;" and then offered in evidence the judgment-roll in the said action against the plaintiff. Defendants W. W. Race and Shafer objected to the judgment-roll as evidence against them on several grounds; but the court below overruled the objections and permitted the record to be received in evidence.

Plaintiff gave evidence that he had paid the judgment recovered against him, and some other evidence, tending to show that the defendant in the execution had personal property in the county out of which the amount of the execution might have been realized, while the same was in the hands of the deputy, Race; but as the court directed the jury to return a verdict for the plaintiff for the full amount of the judgment recovered against him in the former action, that evidence is not important in determining the questions relied upon by the appellants for a reversal of this judgment. The plaintiff had judgment below.

Charles W. Felker, for appellants, upon the question decided by this court, cited 1 Greenl. Ev., §§ 523, 538-9; Brandt on Suretyship, 107; 1 Starkie on Ev., § 32; 3 id. 1300; *Dutchess of Kingston's case*, per DE GRAY, C. J., 20 How. State Trials, 578; 9 Wheat. 681; *Gookin v. Sanborn*, 3 N. H. 491; *Tarbell v. Whiting*, 5 id. 63; 8 Wend. 512, 516; *Douglass v. Howland*, 24 id. 56; *Thomas v. Hubbell*, 35 N. Y. 121; 15 id. 405; 61 id. 356; *Beall v. Beck*, 3 H. & M. (Md.) 242; *Munford v. Overseers*, 2 Rand. (Va.) 313; *McKellar v. Bowell*, 4 Hawks, 41; *Lucas v. The Governor*, 6 Ala. 826; *Walker v. Forbes*, 25 id. 139; *Lartigue v. Baldwin*, 1 La. Cond. 356; *Snell v. Allen*, 1 Swan (Tenn.), 208; 27 Ohio, 498;

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Pico v. Webster, 14 Cal. 202 ; 10 id. 517 ; 7 Wis. 306 ; 36 id. 612. He also cited and distinguished *Duffield v. Scott*, 3 T. R. 374 ; *Huzzard v. Nagel*, 40 Penn. St. 178 ; *Fay v. Ames*, 44 Barb. 327 ; *Rapelye v. Prince*, 4 Hill, 119 ; *Lee v. Clark*, 1 id. 56 ; *Westervelt v. Smith*, 2 Duer, 449 ; and *Crawford v. Turk*, 24 Gratt. 176 (which relate to bonds conditioned to indemnify against costs, damages and expenses which a sheriff might incur by reason of neglect or omission of duty, and in which it is held that such conditions anticipate litigation to which the obligators would not be parties, and are stipulations to be bound by the event of a suit between strangers) ; *Irwin v. Backus*, 25 Cal. 214 ; *Heard v. Lodge*, 20 Pick. 53 ; *Governor v. Shelby*, 2 Blackf. 26 ; *State v. Coste*, 36 Mo. 437 ; *Annett v. Terry*, 35 N. Y. 256 ; *Garber v. Commonwealth*, 7 Penn. St. 256 ; *Hobbs v. Middleton*, 1 J. J. Marsh. 176 ; and *Ralston v. Wood*, 15 Ill. 159 (where sureties on the bond of executor or administrator, or on a bail or appeal bond, and the like, have contracted with reference to the payment of money or property, or accounting therefor, or other *particular* act which by covenant their principals are bound to perform) ; and 44 Barb. 327 ; 2 Duer, 449 ; 5 Allen, 509 ; 8 Watts, 398 ; 17 S. & R. 354 ; and 5 Whart. 144 (where obligors upon a *joint* bond were held to be in privity of contract with each other, and regarded and treated, *quoad* the contract, as one person).

Moses Hooper, for respondent.

TAYLOR, J. The complaint in the record of the action against the sheriff shows that plaintiff's cause of action in that case was founded upon the neglect of the deputy, Race, as above set forth.

The only exception to the evidence in this case which it is material to consider is that taken to the introduction of the judgment-roll in the action against the sheriff. The learned counsel for the appellants insist that, as they were not parties to that action, and had no notice thereof, it was not evidence against them in this action for any purpose. It is not denied but that it was properly received as evidence against Stephen W. Race, the deputy, as he had notice of the action, and defended the same, and was therefore bound thereby.

In the case presented by the record, the principal having had notice of the action against the sheriff for his default, and having

appeared and defended that action, the judgment against the sheriff is just as conclusive against him as though the sheriff, after having been compelled to pay that judgment, had brought an action against his deputy for such neglect and misconduct, and had recovered judgment against him in that action.

The exceptions of the appellants present the question whether the sureties in an official bond are bound in any way by a judgment against their principal, in an action not brought upon such bond for a breach of duty which they have covenanted against in such bond. After examining a great number of decisions in which the question has been discussed and decided, we think the great weight of authority, as well as the better reasons, are in favor of holding that the judgment against the principal is admissible as evidence against the sureties; and without deciding how far and upon what points the same is conclusive, we hold that the same is at least presumptive evidence of the right of the plaintiff to recover, and of the amount of such recovery, when the execution of the bond is proved or admitted, and the record of the former judgment shows that the recovery was for acts or omissions the proof of which would show a breach of some one or more of the conditions of the bond.

It is urged by the counsel for the appellants that such judgment is "*res inter alios acta*," and therefore not admissible. We think otherwise. It will be remembered that in an action of this kind the plaintiff's right of action depends upon the fault or misconduct of their principal, and such fault or misconduct must be proved in the action in order to entitle the plaintiff to recover at all. It would seem, therefore, that a judgment against such principal, which is absolutely conclusive against him that he was guilty of such fault, ought to be at least presumptive evidence against his sureties of that fact.

It is evident that the sureties could, in an action against them, make use of a judgment in an action against their principal as a defense, when the judgment was in his favor.

Suppose in this case the sheriff had first brought his action against the principal, such principal not having had any notice of the proceedings against the sheriff, and in such action the jury had found a verdict in favor of the defendant, on the ground that he had not been guilty of any neglect in not collecting the amount of the execution; and after such verdict and judgment the sheriff had brought his action against the sureties in the bond of the principal,

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alleging the same neglect of the deputy as his cause of action ; is it not evident that the sureties could use the judgment in favor of their principal as a complete answer to the plaintiff's cause of action ? The judgment in favor of the principal in the former action would be conclusive evidence against the sheriff that he had not been guilty of the neglect charged against him. The sheriff could only recover in the action against the sureties by proof of the guilt of their principal, and as between the sheriff and the principal, the question of his guilt would be *res adjudicata* in the first action. Such judgment would therefore be a complete bar to the action against the sureties.

Again, if the sheriff had sued the principal without joining the sureties, and had recovered a sum of money less than he had been compelled to pay on account of the default of his deputy, and had then commenced a suit against his sureties, claiming a larger sum, it is also evident that the judgment against the principal would be conclusive in favor of the sureties as to the highest amount of damages he could recover against them. The judgment against the principal would be conclusive against the sheriff as to the extent to which he had been damaged by his default ; and the sureties, who are to answer only to the extent of the injury sustained by the sheriff on account of the default of their principal, could avail themselves of the verdict in the former action to limit the amount of damages, and the sheriff would be as completely bound by the same as though he had expressly agreed that his damages did not exceed the amount of the former verdict.

These illustrations show that the judgment in the action against the principal is not entirely "*res inter alios acta*" as to the sureties. Such judgment, if adverse to the plaintiff, is conclusive in favor of the sureties, and in any event is conclusive as to the extent of damages which he may recover against them. This view of the question is maintained in the following cases : *Masser v. Strickland*, 17 S. & R. 354, 358 ; *Drummond v. Prestman*, 12 Wheat. 515, 519, 520 ; *Webbs v. State*, 4 Coldw. 200, 202.

There is another view of the question which is well stated by a very able and learned judge, Chief Justice SHAW, in the case of *City of Lowell v. Parker*, 10 Metc. 309, 315, which was also an action against the sureties on an official bond. In reply to the same objection which is made in this case, that the judgment against the principal was *res inter alios*, and therefore not admissi-

blo against the sureties, the learned chief justice said : " We think this objection cannot be supported under the circumstances of this case. When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for the failure of the performance of such duty, if not conclusive, is *prima facie* evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by countervailing proofs."

Other courts have placed the admissibility of the judgment against the principal in evidence against the surety, in cases where the bond is the joint bond of the principal and surety, or their joint and several bond, on the ground that, as the judgment against the principal in the first action is conclusive against him in the second, it must have the same effect as against his co-obligors ; and others on the ground that, in a case like the present, a notice to the principal, who is one of the co-obligors in the bond with the surety, is notice to all, and therefore all are bound by the judgment against the principal. These reasons for holding the judgment against the principal evidence against the sureties were relied upon to some extent in the following cases : *Bartlett v. Campbell*, 1 Wend. 50 ; *Fay v. Ames*, 44 Barb. 327, 333 ; *Evans v. Commonwealth*, 8 Watts, 398 ; *Eagles v. Kern*, 5 Whart. 144.

The reason for holding to the rule laid down by Chief Justice SHAW in the case above cited, we think, are most satisfactory, and, as we understand them, they are the following : *First*. Because the judgment in the action against the principal, when in his favor, is a complete bar to the action against the sureties, and in any case fixes an absolute limit to the damages which can be recovered against them, it should be mutual, so far, at least, that when the judgment is against the principal, it should be presumptive evidence against the sureties. *Second*. The nature of the contract in official bonds is that of a bond or indemnity to those who may suffer damages by reason of the neglect, fraud or misconduct of the officer. The bond is made with the full knowledge and understanding that in many cases such damages must be ascertained and liquidated by an action against the officer for whose acts the sureties make themselves liable ; and the fair construction of the contract of the sureties is,

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that they will pay all damages so ascertained and liquidated in an action against their principal. This construction of the contract is the most reasonable, and works no hardship against the sureties. It is better for them that this should be so. Otherwise it would be necessary for every person who desired to hold the sureties for the misconduct of their principal, to join them in the first action, or else be subjected to a second litigation of the same matter, if, unfortunately, he should fail to obtain satisfaction after judgment against the principal; whereas, if the rule held in the case of the *City of Lowell v. Parker, supra*, is adhered to, the party injured will in most cases litigate the matter with the principal alone.

The principal is the one who ought to be at the expense of the litigation, and who ought to pay the damages. He is also the one who has the knowledge of the facts, and is certainly better prepared to litigate the matter than the sureties, who are not supposed to have any knowledge of the transaction. Certainly the defense is likely to be properly made by the principal, who has full knowledge of the facts, and who is to suffer most severely in case of a decision adverse to him. In most cases of this kind, if the sureties were sued in the first instance, with their principal, the defense of the action would be made by such principal; and yet the judgment in such an action would necessarily be conclusive upon all. Holding the judgment against the principal alone presumptive evidence, as against the sureties, of the facts established by such judgment, can work no hardship so long as the right is reserved to them of showing that the defense in such action was not made in good faith, was fraudulent, collusive, or suffered to be obtained through mistake as to the facts.

The rule laid down in the case of *City of Lowell v. Parker* is fully sustained by the following cases: *Lee v. Clark*, 1 Hill, 56; *Franklin v. Hunt*, 2 id. 671; *Westervelt v. Smith*, 2 Duer, 449; *Annett v. Terry*, 35 N. Y. 256; *Fay v. Ames*, 44 Barb. 327; *Bartlett v. Campbell*, 1 Wend. 50; *Huzzard v. Nagle*, 40 Penn. St. 178; *Eagles v. Kern*, 5 Whart. 144; *Evans v. Commonwealth*, 8 Watts, 398; *Masser v. Strickland*, 17 S. & R. 354; *Webbs v. State*, 4 Coldw. 199, 200; *Atkins v. Baily*, 9 Yerg. 111; *Baxter v. Marsh*, 1 id. 460; *Drummond v. Prestman*, 12 Wheat. 515; *McLaughlin v. Bank*, 7 How. 220, 229; *Iglehart v. State*, 2 Gill & Johns. 235, 245; *Dane v. Gilmore*, 51 Me. 544, 551, 555; *Tracy v. Goodwin*, 5 Allen, 409; *Train v. Gold*, 5 Pick. 380; *Charles v. Hoskins*, 14

Iowa, 471 ; *Lyon v. Northrup*, 17 id. 314 ; *Duffield v. Scott*, 3 T. R. 374 ; *Jones, Adm'r'x, v. Williams*, 10 L. J. (N. S.) Exch. 120, 123 ; *State v. Woodside*, 7 Ired. 296 ; *McLin v. Hardie*, 3 id. 407 ; *State v. Colerick*, 3 Ohio, 487 ; *Westerhaven v. Clive*, 5 id. 136.

The only cases in this court bearing upon this question are *Gerber v. Ackley*, 32 Wis. 233 ; *Saveland v. Green*, 36 id. 612 ; and *Elwell v. Prescott*, 38 id. 274. Neither of these cases decides the point in question. Freeman on Judgments, § 180.

The learned counsel for the appellants has cited several decisions, of courts in New York and other States, which seems to hold the doctrine contended for by him, and particularly relies upon the cases of *Douglass v. Howland*, 24 Wend. 35, and *Thomas v. Hubbell*, 15 N. Y. 405. Of these cases it may be said, that the Court of Appeals, in the case of *Thomas v. Hubbell*, 15 id. 405, did not hold that the judgment against the principal could not be received as *prima facie* evidence against the sureties, but did hold that the sureties were at liberty, notwithstanding the judgment against the principal, to show that there was a good defense as against their principal to the action, and so defeat the plaintiff's action. When this case came before the Court of Appeals the second time (35 N. Y. 121), the judgment for the plaintiff in the court below was affirmed. But the court held that the judgment against the principal was conclusive as to the amount of damages the plaintiff could recover against the sureties, and that they were not concluded by the judgment as to the merits of the action, but might show affirmatively that the plaintiff had no right of action against their principal, as a defense, the same as was held on the first appeal. It would seem that in both cases, both in the Court of Appeals and the court below, the judgment was considered as *prima facie* evidence, but that the defendants were not concluded by it.

In the case of *Douglass v. Howland*, the action was brought upon a contract by which the principal agreed to account for and pay over such sum as should be found due and owing by him to the plaintiff, and which the defendant had guaranteed the performance of. The plaintiff had filed a bill against the party to compel him to render an account and pay over what was due, and had judgment against the party, which was not paid ; afterward he brought suit against the guarantor upon his covenant to guaranty. Upon the trial of this action the plaintiff offered the decree in evidence against the guarantor. Justice COWEN, who delivered the opinion

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of the court after an able and quite exhaustive review of the cases, comes to the conclusion that the record was not admissible, as being *res inter alios acta*; but at the close of his argument it seems to me he very greatly weakens its force by admitting that if the party for whom the defendant was guarantor had rendered an account voluntarily, and without action, and had admitted an amount due upon such account, the balance so struck by the parties would have been conclusive upon the guarantor; "that the striking of such balance would be an admission making a part of the *res gestæ*," and bind the defendant. To me there does not seem to be any force in the distinction made by the learned judge. If the rendering of an account voluntarily by the principal would bind his surety, why should he not be bound when such account is rendered under the watchful and unprejudiced supervision of a court of chancery? Certainly it could make no difference whether the account was rendered in or out of court, if the account was rendered and balance struck by the principal himself. Within the decision of the learned justice, if the record of the proceedings in chancery had shown that the court had found the balance upon an account rendered by the principal and as struck by him, the account so rendered, though a part of the proceedings in the former action, would have been evidence against the guarantor, and would have concluded him. This was expressly held by the court in the case of *Iglehart v. State*, 2 G. & J. 235, 245. See, also, on the same point, *Drummond v. Prestman*, 12 Wheat. 519, and cases cited; *Tyler v. Ulmer*, 12 Mass. 164; *Mott v. Kip*, 10 Johns. 478; *Governor v. Twitty*, 1 Dev. 153.

If the admissions, statements and confessions of judgment by the principal are to be received in evidence against the sureties, as either presumptive or conclusive proofs of the facts admitted, stated or confessed, there does not appear to be any good reason for holding that the findings of a court or jury upon such admissions, statements or confessions should not be presumptive evidence of such facts against them.

Whilst we are compelled to admit that the authorities are conflicting upon the question under consideration, we are clearly of the opinion that the weight of authority is in favor of holding the judgment against the principal in an official bond *prima facie* evidence against the sureties.

The defendants having given no evidence upon the trial in the court below, upon the proofs offered by plaintiff he was clearly

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entitled to judgment, and there was no error in directing the jury to find for him.

BY THE COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Duffield v. Scott*, 3 T. R. 874, the action was on a bond to indemnify the plaintiff against his wife's future debts. A judgment recovered by a creditor against the husband was held conclusive against the defendant, although he had no notice of the action. This case is not precisely in point.

In *Fug v. Ames*, 44 Barb. 827, the judgment was held conclusive. The court said: "It was no part of the plaintiff's agreement with the sureties in the bond that they should have notice of suits brought against him for the misconduct of the deputy; and their liability as indemnitors was not made to depend upon such notice."

Bartlett v. Campbell, 1 Wend. 50, was an action on a joint and several agreement of indemnity, signed by the principal as constable, and by another as "security." Held, that notice to the principal was notice to the surety.

The Pennsylvania cases cited by the court hold the judgment on a constable's bond conclusive as to the liability and amount of damages, but this seems based upon a statute.

Tracy v. Goodwin, 5 Allen, 409, holds that the judgment against the principal on a bond joint and not several is conclusive against the surety. To the same effect, *Mumford v. Overseers*, 2 Rand. 818.

The other cases cited by the court sustain the decision of the principal case, that the judgment is *prima facie* evidence against the surety not notified.

In *Gookin v. Sanborn*, 3 N. H. 491, an action on an executor's bond, it was held that the sureties were not bound by the judgment against the principal, to which they were strangers, but whether the judgment was not *prima facie* evidence was not ruled upon. So of *Parbell v. Whiting*, 5 id. 63.

In *Beull v. Beck*, 3 H. & M. 242, a judgment on a deputy sheriff's bond, against the principal, was offered in evidence against the surety, and rejected on an equal division of the trial court. This was affirmed without any opinion.

McKellar v. Bowell, 4 Hawks, 84, was an action on a joint and several guardian's bond. The judgment was held no evidence against the sureties. This is put on the grounds that "they have made no agreement, by the nature of their contract, to be concluded by a judgment against their principal," and that they were not privies. The court also lay stress on the fact that a third party could not avail himself of the judgment, even against the party. "To admit a verdict as evidence under such circumstances would be giving the party the benefit of evidence which he could not avail himself of in his own suit." This "goes to show, that if the guardian had succeeded in the suit brought against him by the plaintiff, the judgment could not be offered by these defendants to repel the action; and therefore, as the judgment was rendered against the evidence, it shall not be evidence against this defendant."

Lucas v. The Governor, 6 Ala. (N. S.) 826, was an action on a sheriff's bond. The judgment was held no evidence. The court say: "We have looked into these decisions" (Pennsylvania, Virginia, and Ohio), "and so far as they hold the judgment against the sheriff to be *prima facie* evidence against the sureties, it is impossible to perceive on what principle they rest. Doubtless, there are cases where the acts or admissions of the sheriff have the effect to bind his sureties; but it will probably be ascertained, whenever these are necessary to be examined, that the acts or admissions are a part of or immediately connected with the official duty. The case of a judgment against him is certainly not of this description; and we can conceive of no reason why it should have any effect against his sureties, unless they are concluded by it. If such a judgment is *prima facie* evidence, any one will perceive the difficulty there is in rebutting it; and why should any greater effect be given to a judgment obtained by default against a sheriff, or by his confession, against his surety, when it is certain that his confession by itself would not be so? The judgment against the sheriff is not essential, in this State, to enable the party to proceed against the surety, and therefore seems to have no bearing in an action upon his bond. It

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may be remarked that the case of a sheriff is entirely different from that of an administrator or guardian, inasmuch as a part of their duty is the settlement with the court." The italicised sentence seems to take away the force of this case as an authority.

Pico v. Webster, 14 Cal. 202, holds the judgment (on a sheriff's bond) not to be evidence against the unnotified sureties. The opinion contains an excellent review of the authorities *pro* and *con* as follows:

"There is no little conflict in the cases on this subject. There can be no doubt that where the surety undertakes for the principal, that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, the judgment is conclusive against the surety; for the obligation is express that the principal shall do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such case stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is of course independent of any such fact. *Wain v. Gold*, 5 Pick. 480; *Lincoln v. Blanchard*, 17 Vt. 474. It is upon this ground that the liability of bail is fixed absolutely by the judgment against the principal. But this rule rests upon the terms of the contract. In the case of official bonds the sureties undertake, in general terms, that the principal will perform his official duties. They do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general principle that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact that another party has defended on the same cause of action and been unsuccessful. As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense, and be themselves responsible for the result of it, the fact that the principal unsuccessfully defended has no effect on their rights. They have a right to contest with the plaintiff the question of their liability, for to hold that they are concluded from this contestation by the suit against the sheriff, is to hold that they undertook for him that they would be responsible for any judgment against him which might be rendered by accident, negligence or error, instead of merely stipulating that they would be responsible for his official conduct. The authorities which sustain this view are numerous. In *McKellar v. Barrell*, 4 Hawks, 34, a decree against the administrator of a guardian was held not to be evidence against the sureties of a guardian to charge them with the amount which was recovered against the estate for unfaithful administration of the trust. *Munford v. Overreers*, 2 Rand. 813, went a little further, holding that a judgment against the sheriff was no estoppel against him in an action on the bond against him and his sureties. It seems to be held, then, that no recovery could be had against the principal, because he was not liable jointly with the sureties, and that the record of the judgment would be only *prima facie* evidence against the sureties. *Beal v. Beck*, 3 Harr. & McH., is to the same effect. *Douglass v. Howland*, 24 Wend. 33, is a leading case. The authorities are reviewed by Mr. Justice COWEN with his usual learning. That case was covenant, brought by the plaintiff against the surety on an obligation by the principal to account and pay over such sum as shall be found to be owing by him, and the surety covenanted that the party thus agreeing 'shall perform the agreement.' A decree in chancery against the principal was offered. The decree was on a bill filed to compel an account; *held*, that it was no evidence against the surety, unless he had notice of the suit and an opportunity to defend in the name of the principal. Many authorities are cited by the learned judge, who concludes that the surety's obligation was to pay over a balance due, not that he should abide by a judgment at law or a decree in chancery for not accounting.

"A distinction is taken as to administration bonds founded upon the terms of the obligation, as used in South Carolina and other States—those being that the administrator should account, meaning account before the probate court—which was held equivalent to an obligation by the surety to pay such decree as that court might render. See Cow. & Hill's notes to 1 Phil. Ev. 934. The same doctrine was involved in the case of *Moss v. McCullough*, 5 Hill, 181. It was *held* there that in general a judgment obtained by a creditor against the principal is not evidence against the surety for the purpose of establishing the demand. In this case suit was brought against a stockholder of a corporation organized under the New York laws, the stockholder, under the act, not being responsible until after judgment against the corporation; *held*, that the judgment against the corporation

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could not be used against the defendant either as *prima facie* or conclusive evidence of the genuineness of or responsibility for the debt. Previous decisions of the court (*Slee v. Bloom*, 20 Johns. 669; 2 Hill, 285) are explained, and *Douglas v. Howland* is affirmed. The court say: 'The contract is to pay the debt, not the judgment. The general doctrine of *Douglas v. Howland* has been recently reviewed in the Court of Errors. *Jackson v. Griswold*, 4 Hill, 552. The question was embarrassing, and the cases were far from uniform. The decided weight of authority, however, both at law and in equity, was found to be against allowing the surety to be at all embarrassed by the judicial proceeding. He stands, as was held in *Slee v. Bloom*, on the precise rights of his principal under the contract. If the latter can defend, so can the surety. The surety is bound by the acts in pais of the principal or his agents, but is neither bound nor touched by any judicial proceeding to which the principal alone is a party; nay, says *Jackson v. Griswold*, even though he actually participate in the prosecution or defense, unless he be a party to the record.' BRONSON, J., delivered a separate opinion, affirming this view of the question.

"The case of *Jackson v. Griswold* is as just stated. The doctrine of *Douglas v. Howland* is affirmed, and the dicta in that case that the surety might be bound by notice other than that required in the usual course of proceeding to bring in or bind a party, withdrawn. *Carmalt v. Commonwealth*, 5 Binn., is a strong and well-reasoned case to the same effect.

"It is true there are authorities to the contrary, of great weight. In 10 Metc. 314 it was held that the judgment was *prima facie* evidence against the surety. So in *Masser v. Strickland*, 17 S. & R. 354, and several other Pennsylvania cases, and in *McLaughlin v. Bank of Potomac*, 7 How. 220. But in *Masser v. Strickland* the authority is weakened by the able dissenting opinion of Chief Justice GIBSON, who coincides with his predecessor, Chief Justice TILGHMAN, in 5 Binn.

"The English rule seems to be that laid down in New York. See *King v. Norman*, 5 C. B. 883, where it was held that the judgment against a surety who gave no notice to the principal was no evidence against the principal. The action was to recover money paid by the plaintiff as surety on a tax collector's bond.

"This precise question arose in the case of *Carmichael v. Governor*, 3 How. (Miss.) 236. Mr. Chief Justice SHARKEY delivered the opinion, holding that a judgment against the sheriff, on motion to pay over money, is not evidence in an action against the sureties on the sheriff's bond to establish the breach thereof in failing to pay over money. The court cite the case in 5 Binney as authority, also 1 Stark. Ev. 182, 189, and place their reasoning on the same grounds as those which we have before assumed; and they add 'that if the judgment was admissible in evidence it was certainly conclusive unless it was fraudulent, and the consequence would be that Carmichael would be bound by a judgment to which he was no party, and had no opportunity of making a defense, which might have been sufficient if he had been permitted to defend.' *Lucas v. Governor*, 6 Ala. 826, is to the same purpose.

"We cannot see how, if the judgment be evidence at all, it is less than conclusive, in the absence of fraud or collusion. The reason which admits it must be broad enough to give it conclusive effect."

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(48 Wis. 79.)

Municipal corporation—liability for tort of its officer.

A city is not liable in an action of damages where its treasurer, upon a tax warrant, sold the plaintiff's goods by mistake for those of another.*

* To same effect, *Hunt v. City of Boonville* (65 Mo. 620), 27 Am. Rep. 292.

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ACTION of damages for conversion of personal property. The property in question was that of the plaintiff, and by mistake was seized and sold by the treasurer of the defendant upon its tax warrant against the goods of another. The plaintiff had judgment below.

E. Mariner and *C. A. Hamilton*, for appellant.

C. W. Felker, for respondent. The act of the treasurer was within his general authority as an officer ; and there is nothing to show that he did not act in good faith, "with an honest view to obtain for the public a lawful benefit," or to take the case out of the rule of *Hamilton v. Fond du Lac*, 40 Wis. 47 ; *Hurley v. Texas*, 20 id. 634 ; *Squiers v. Neenah*, 54 id. 588. The rule is well established in other States. *Thayer v. Boston*, 19 Pick. 511 ; *Howell v. Buffalo*, 15 N. Y. 512-20 ; *Conrad v. Ithaca*, 16 id. 158 ; *West v. Brockport*, id. 161-71 ; *Lee v. Sandy Hill*, 40 id. 442 ; *B. & H. Turnpike Co. v. Buffalo*, 58 id. 639 ; *Allen v. Decatur*, 23 Ill. 272 ; *McCombs v. Council*, 15 Ohio, 474 ; *Sheldon v. Kalamazoo*, 24 Mich. 383 ; *Wild v. New Orleans*, 12 La Ann. 15 ; Dill. on Mun. Corp., § 770 ; Add. on Torts (D. & B.'s ed.), 1300. Moreover the city never returned the money, and in some of the defenses set up in the answer, it alleges that the property was subject to the sale ; and it must be held to have thus *ratified* the act. *Hamilton v. Fond du Lac*, *supra* ; Dillon, §§ 69, 70.

LYON, J. Doubtless it has very frequently happened that municipal officers charged by law with the duty of collecting the public revenue have, for non-payment of taxes, seized property belonging to persons not liable to pay such taxes. Many cases of tort, brought against such officers by the owners of property so seized, to recover damages therefor, are probably reported in the books ; but we have been referred to no case, and upon most diligent search have been unable to find one, in which an action of tort for such unlawful seizure has been sustained or even commenced against a municipal corporation.

The absence of such cases raises a very strong presumption that the bar everywhere entertain the view that such actions cannot be maintained. The circumstance is not, however, conclusive of the question ; for if a case like this comes clearly within the estab-

lished doctrine of *respondet superior*, the action must be upheld, notwithstanding the absence of cases directly in point.

To determine, therefore, whether this action can be maintained, resort must necessarily be had to the general principles of law relating to the liability of municipal corporations for the torts of their officers or agents.

That actions sounding in tort will lie in certain cases against municipal corporations, though formerly doubted, is now perfectly well settled. It is to be determined whether this is one of those cases.

The rules of law by which the question of the liability of the city of Menasha, in an action of tort for the unlawful seizure by its treasurer of the property of the plaintiff, is to be determined, are thus stated by Chief Justice SHAW in *Thayer v. City of Boston*, 19 Pick. 511: "There is a large class of cases in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known, at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful; still if it was not known and understood to be unlawful at the time; if it was an act done by the officers having competent authority, either by express vote of the city government or by the nature of the duties and functions with which they are charged by their offices, to act upon the general subject-matter; and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, — reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. * * *

"The court is therefore of opinion that the city of Boston may be liable in an action on the case, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or where, after the act has been done, it has been ratified by the corporation, by any similar act of its officers. * * * As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*. It must further appear that they were expressly authorized to do the acts by the city government, or that

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they were *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate ; or that, in either case, the act was adopted and ratified by the corporation."

There is no pretense in the present case that the city of Menasha has ratified the unlawful act of its treasurer. True, the money realized on the sale of the plaintiff's property was paid into the city treasury in satisfaction of the tax assessed against Kelley & Co.; but it does not appear that the city council, or any officer of the city other than the treasurer, had notice of the source from which the money was derived, or did any act sanctioning or approving the seizure of the plaintiff's property.

Unlike the case of *Hurley v. Texas*, 20 Wis. 634, in which the levy was void, the taxes were lawfully assessed, and the warrant for the collection thereof lawfully issued to the treasurer by the mayor and city clerk under the seal of the city. The warrant commanded the treasurer, in case Kelley & Co. neglected or refused to pay the taxes assessed against them, to collect the same by distress and sale of *their* goods and chattels. It does not purport to give him authority to make such taxes out of the goods and chattels of the plaintiff or any person other than that firm. It was known and understood, when the plaintiff's goods were seized, that if they belonged to the plaintiff the seizure was unlawful. The treasurer had no authority, real or apparent, to make the seizure, and although he made it *colore officii*, and in the honest belief that the goods belonged to Kelley & Co., it cannot correctly be said that he had general authority to act for the city in that behalf. The treasurer had specific authority in a certain contingency to seize the goods of Kelley & Co., but he had no more authority to seize the goods of the plaintiff for the delinquent taxes of others, than he had to commit an assault and battery on a person taxed to compel him to pay his taxes. And indeed, if the city is liable in the one case, it is not perceived why, on the same principle, it would not be liable in the other. Should the treasurer assault a tax debtor and take from his pocket by force the amount of his tax, it would hardly be claimed that the city is liable in tort for such unlawful and criminal acts.

The case of *Squiers v. Neenah*, 24 Wis. 588, cited and relied upon by counsel for the plaintiff, is distinguishable from the present case. The board of trustees of the village of Neenah attempted to lay a street through plaintiff's land, but because of a defect in

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the village charter no street was lawfully laid out. Believing, however, that it was lawfully established, the board ordered the street commissioners to open the street, and one of them opened it by removing the plaintiff's fences, against his protest. The action was trespass against the village to recover damages for the act of the street commissioner, and the plaintiff recovered. The unlawful act complained of was expressly directed by the branch of the village government invested by law with jurisdiction to act for the corporation in the matters of laying out and opening streets; and hence the case was clearly within the rule of municipal liability laid down in *Thayer v. Boston, supra*. That case is referred to and approved in the opinion by DIXON, C. J.; also in *Hurley v. Texas, supra*, and in *Hamilton v. Fond du Lac*, 40 Wis. 47. In the two cases last cited, as in *Squiers v. Neenah*, the unlawful acts complained of were done pursuant to express orders of the respective city councils.

Did the charter of Menasha authorize the city council to control and direct its treasurer specifically in the matter of collection of taxes, and had the council directed him to seize, or after seizure had it directed him to sell, the property of the plaintiff to satisfy the taxes of Kelley & Co., we should have a case more nearly resembling those above cited.

We have thus far considered the case upon the hypothesis that the treasurer is the agent or servant of the city, for whose torts the city may, in a proper case, be held liable. But under the authorities, it may well be doubted whether the rule *respondeat superior* has any application to acts performed or torts committed by him in the collection of taxes. The levy and collection of taxes are governmental rather than municipal functions, delegated, it is true, to municipal officers for convenience, but still governmental. It may well be claimed, that in the exercise of those functions, such officers are public officers, discharging public and not municipal or corporate duties. If so, there seems to be no ground for holding the municipality liable for their torts committed in the exercise of those functions—no room for the application of the rule *respondeat superior* in such cases. A distinction is made in many well-considered cases between torts committed by municipal officers or agents in the discharge of such public duties, and those committed in the discharge of purely municipal or corporate duties by the officers or agents of the city or village; the municipality being held

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liable for the latter, but not liable for the former class of torts. In addition to the cases and authorities cited in the brief of counsel for the city, see 2 Dill. on Mun. Corp., §§ 464–770, inclusive, and cases cited; *Bailey v. Mayor, etc., of N. Y.*, 3 Hill, 531; *Oliver v. Worcester*, 102 Mass. 489; s. c., 3 Am. Rep. 485. This distinction was recognized in *Hayes v. Oshkosh*, 33 Wis. 318, and controlled the judgment of the court.

- We conclude that the city is not liable in this action for the tort of the treasurer. Whether the plaintiff can maintain an action, as for money had and received, to recover of the city the proceeds of the sale of his property, paid into the city treasury, or any part thereof, we do not determine.

BY THE COURT. — Judgment reversed and cause remanded, with direction to the Circuit Court to render judgment for the defendant.

Reversed and remanded.

SENSENBRENNER V. MATTHEWS.

(48 Wis. 250.)

Lien — of bailee — waived by delivery of property.

One who has acquired a lien for repairs on personal property conclusively waives it by voluntary and unconditional delivery of the property to the owner.

REPLEVIN for a buggy, by Sensenbrenner, a blacksmith, against Matthews, a deputy sheriff. The plaintiff owned a building, occupying part of the first story for his shop. Another part of that story was occupied by Schweitzer & Co. as a wagon shop. The second story was occupied as a paint shop by Maxwell. Schweitzer & Co. leased their shop and Maxwell's from the plaintiff, and underlet to Maxwell. A trap door in the floor connected Maxwell's paint shop with plaintiff's shop, through which Maxwell had a right of way for taking and returning articles to be painted. Schweitzer & Co. did the wood work of the buggy for Maxwell, and plaintiff furnished the iron and did the iron work, for the price of \$65; \$34 to be paid in painting. When plaintiff had completed the iron

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work, Maxwell removed the buggy to his shop, with plaintiff's consent, and kept it about three weeks, painted it, and sold it to defendant Henry. Plaintiff objecting to the removal of the buggy from Maxwell's shop until Maxwell should have settled with him, Henry procured a writ of replevin, by virtue of which, in the plaintiff's absence, the buggy was peaceably removed from Maxwell's shop, through the plaintiff's, just outside, and delivered to Henry. Before its removal from the premises, plaintiff returned and forbade the further removal, but it was taken away by Matthews and Henry. The defendant had judgment below.

Elbridge Smith, for appellant.

J. B. Hamilton, for respondent.

RYAN, C. J. The shops of the appellant, Schweitzer and Maxwell, although in the same building, were held by them respectively in severalty; and the right of way of Maxwell, although passing through the shops of the appellant or Schweitzer, was part of his holding and used by him of his own right.

The buggy belonging to Maxwell was delivered to him through the right of way by the appellant, after it had been ironed by the latter. It was delivered with the expectation that it should be painted by Maxwell; but Maxwell owed no duty, either to Schweitzer or the appellant, to paint it. The delivery was unconditional, and the buggy must be taken to have been delivered to Maxwell in his right as owner of it.

This delivery operated as an absolute waiver of all lien of the appellant for ironing the buggy. The essence of lien, in such cases, is possession. Lien cannot survive possession; and except in case of fraud, and perhaps mistake, such a lien cannot be restored by resumption of possession. "Lien is a right to hold possession of another's property for the satisfaction of some charge attached to it. The essence of the right is possession; and whether that possession be of officers of the law or of the person who claims the right of lien, the chattel on which the lien attaches is equally regarded as in the custody of the law. Lien is neither a *jus ad rem* nor a *jus in re*, but a simple right of retainer." 3 Pars. on Cont. 234.

"The voluntary parting with the possession of the goods will amount to a waiver or surrender of a lien; for as it is a right

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founded upon possession, it must ordinarily cease when the possession ceases." Story on Agency, § 367.

As this disposes of the lien set up by the appellant to support this action; it is immaterial how the respondents came into possession. In replevin, a plaintiff recovers on his own right of possession, not on the weakness of the defendant's right.

BY THE COURT.—The judgment of the court below is affirmed.

Judgment affirmed.

MORTON V. SMITH.

(48 WIA. 265.)

Highway — liability of lot-owner for defective condition of sidewalk — construction of statute.

A city charter required lot-owners to keep the sidewalk "in a good and safe condition for use," and made them liable for injuries to any person by "reason of a defective sidewalk." The sidewalk in front of defendants' premises had become smooth and slippery by long use, and some third person, with their knowledge, had painted it, thus increasing its slipperiness. The plaintiff slipped and fell on it, sustaining injury. *Held*, that defendants were liable.

ACTION for injuries from an unsafe sidewalk. The opinion states the facts. The plaintiff had judgment below.

Cassoday & Carpenter, for appellants.

Bennett & Sale, for respondent.

COLE, J. The charter of the city of Janesville imposes upon the owner of a lot fronting on any street in the city the duty of keeping the sidewalk in front of his lot in a good and safe condition for use; and in case an injury shall occur to any person by reason of a defective sidewalk, the owner is made liable for the damages thus sustained. § 9, ch. 298, P. & L. Laws of 1869. This action is brought upon this provision of the charter. The gravamen of the complaint is that the defendants laid a sidewalk of limestone along Main street in front of their building and lot, which walk, at the time the plaintiff was injured, had by use become smooth

and unsafe to walk on, and that with the knowledge of the defendants, some person had covered a part of the sidewalk at this point with red paint, mixed with oil or other liquid, thereby negligently and unlawfully adding to the insecurity of the walk, and rendering the same unsafe and dangerous to walk on by reason of its slippery condition.

There was evidence given on the trial which tended to sustain this cause of action. A great number of exceptions were taken to the rulings of the court below, which cannot be conveniently noticed in detail. The principal questions in the case arise on exceptions to the charge of the court as given, and to the refusal of the court to give the instructions asked on the part of the defendants. The charge is quite lengthy, and seems to cover every possible aspect of the case.

The learned Circuit judge, among other things, charged in effect, that the law cast upon the defendants the duty and obligation of keeping the sidewalk in front of their building in a reasonably good and safe condition for public use; and that if the plaintiff was injured, while passing over the walk with due care, by reason of its being dangerous, they were liable for the damages sustained. The Circuit judge further told the jury that the defendants were under no obligation to keep the sidewalk in such extraordinary and unusually good and safe condition as to render an accident to one travelling upon it impossible, but were simply bound to keep it in an ordinarily and reasonably good, safe and suitable condition for public use; and that the jury were to determine from their own view of the premises, and from the testimony in the case, whether this was the condition of the walk. In respect to the particular defect in the walk complained of, namely, great smoothness and slipperiness of surface, the court said: "If this walk, by use, had become so smooth and slippery as to be dangerous and not safe for public use; or if by being painted it was made so smooth and slippery as to be dangerous and not safe for such use — such condition was one against which the defendants were bound to provide."

Now it is insisted by the learned counsel for the defendants that the propositions embraced in this charge are not law. The contention is, that the words "defective" and "defect," as used in the charter, clearly imply that there can be no liability unless there be something wanting, something omitted, some imperfection or defect in the nature or quality of the material of which the walk is con-

structed, or some defect in the manner of making the walk; and that the language does not refer to smoothness of the walk arising from use, or to something which happens to be upon the walk without the knowledge or consent of the owner of the lot.

We do not think this construction of the charter is correct. A walk, within the meaning of the charter, may be defective because of imperfection or fault in the materials of which it is made, or from defect or fault in constructing it, or may become defective and dangerous from use, or in consequence of things placed upon it. Suppose that a walk, originally constructed of good materials and in a proper manner, decays or wears out by use so as to be dangerous and unsafe, is it not clear that a walk in such a condition is defective? That it may become defective, or more properly speaking, may become unsafe by reason of things placed upon it, would seem to be a proposition too plain for argument. If, upon a walk constructed properly and with good materials, some slippery foreign substance, like paint or grease, is placed, which renders the walk slippery and dangerous to travellers upon it, it would be idle to say that such a walk was in a "good and safe condition for use;" and where the slippery foreign substance is placed upon the walk with the consent of the owner of the lot, or is suffered to remain upon the walk through the owner's neglect to remove it when notified of its existence, in these cases the owner's responsibility to a person injured in consequence of this slippery substance would seem to be clear; but at first blush there would seem to be less ground for holding the lot-owner liable where the injury occurred by reason of the walk becoming smooth and slippery by public use. Still the owner is under a legal obligation to keep the walk in front of his lot in "good and safe condition for use." This is the measure of responsibility imposed by the charter, and therefore, whether the walk becomes unsafe and dangerous by reason of being made smooth and slippery by public use, or from some other cause, as the decay or wearing out of the material of which it is constructed, still the defect is one coming within the provision of the charter, and for which the lot-owner is liable to an injured party.

It is apparent that slipperiness caused by use is a defect which care and diligence on the part of the lot-owner can remedy or guard against. It is not like slipperiness caused by ice or the action of the elements, which no degree of diligence can prevent. We therefore hold that there was no error in the above charge as given.

Again, the court charged that "in respect to the liability of the defendants in another regard, it depends upon this: If you find that this walk was in a bad and unsafe condition, by the paint placed upon it, or by having been worn down smooth by use, you must find either that they had actual notice of this condition, or you must find further that the defects complained of were of such a nature and had existed for such a length of time as that they must have known, or were bound to know, that it was in this condition. Their liability depends upon that—not that they must of necessity actually have known that it was in this condition; but they must have actually known, or you must find that the defects complained of were of such a nature and had existed for such a length of time that considering the residence of the defendants, the fact of the location of the premises, and their familiarity with them, they must necessarily be chargeable with notice of their actual condition." This charge, as bearing on the question of notice to the defendants of the existence of paint on the walk or its smoothness by use, would seem to be unexceptionable. For if the defect in the walk—if any defect there was—had existed for a considerable time, then, under the circumstances, the defendants would be presumed to have had notice of it. The walk was along one of the principal streets of the city, and the nature of the defect was well calculated to arrest the attention of every person passing over it.

The question whether the walk was in fact dangerous or defective, within the rule laid down by the court in the charge, as well as the question of contributory negligence, seems to have been fairly submitted to the decision to the jury.

The above remarks, we think, dispose of all the material questions arising upon the charge as given, and the refusal of the court to give the instructions asked. Consequently nothing further will be said on these points.

[A minor point omitted.]

BY THE COURT.—Judgment affirmed.

Judgment affirmed.

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NORTHROP V. GERMANIA FIRE INSURANCE COMPANY.

48 Wis. 490.)

Agency — inconsistent employments.

An insurance agent, who is also employed by the owner of property to watch it, may bind the company by a policy of insurance thereon.

ACTION on a policy of fire insurance. The opinion states the facts. The defendant had judgment below.

Geo. E. Sutherland, for appellant.

Cottrill, Cary & Hanson, for respondent. The same person cannot be agent for both contracting parties. *Stewart v. Mather*, 32 Wis. 344; *Farnsworth v. Brunquest*, 36 id. 202; *Meyer v. Hanchett*, 39 id. 419; *Bray v. Morse*, 41 id. 343; *Shirland v. Monitor Iron Works*, id. 162; *Rice v. Wood*, 113 Mass. 133; s. c., 18 Am. Rep. 459; *Farnsworth v. Hemmer*, 1 Allen, 494; *Walker v. Osgood*, 98 Mass. 348; *Raisin v. Clark*, 41 Md. 158; s. c., 20 Am. Rep. 60; *Lynch v. Fallon*, 11 R. I. 311; s. c., 23 Am. Rep. 458; *Scribner v. Collar*, 40 Mich. 375; s. c., 29 Am. Rep. 275; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Everhart v. Searle*, 71 Penn. St. 256.

LYON, J. The testimony tended to show that the plaintiff, who resided in Ripon, owned considerable real estate in Winneconne, including the insured property; and that during several years preceding the time when such property was built, he frequently employed one Edwards, a land agent at Winneconne, and also the general agent of the defendant company there, to collect rents and pay taxes on, and to find purchasers of, portions of such real estate. Edwards was not employed by the plaintiff as his agent in respect to such real estate generally, but was employed from time to time to do specific acts in respect to specific property.

From January to about April 1, 1877, a son of the plaintiff was at Winneconne, and during that time had the sole charge of the insured property, as the agent of his father. In the latter part of March the plaintiff directed his son to have Edwards insure the property in the Underwriters' Agency, the same as Edwards had formerly insured it, and to give the key of one of the buildings to

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Edwards, and have him "take charge of and see to all the property in the building." The defendant company is a member of the Underwriters' Agency. Pursuant to the above instructions, plaintiff's son applied to Edwards to insure the property. Edwards agreed to do so, and they arranged that he should retain the premium out of a larger sum in his hands, collected by him for the plaintiff. Edwards stated that he was busy then, but would write the policy the next day, and that in the mean time the property was insured. The son then put the property in his charge and left Winneconne.

Edwards neglected to write the policy until May 7th. A few hours after he had written it, and mailed his report of the transaction to the proper office, the property was destroyed by fire.

We do not say that the above facts are proved, but only that there is sufficient evidence tending to prove them, to support a special finding that they are true. The nonsuit was granted on the sole ground that the uncontradicted evidence proved Edwards to have been the agent of the plaintiff when he wrote the policy. Because he was such agent, the court was of the opinion that he had no authority to write the policy, and hence that the same does not bind the defendant company.

Under the testimony the jury might properly have found that Edwards had no control of the property, except to watch over it and guard it against destruction or injury. For the purposes of this appeal, we must assume that he had no other power over it. Unless it can be held, therefore, that the mere watchman or guard of the property of another, who happens, at the same time, to be an insurance agent, is thereby incapacitated to write a valid policy on the property at the request of the owner, this judgment cannot be sustained. We are aware of no case in which it has been so held — certainly none was cited on the argument; and we are cognizant of no rule of law which incapacitates an insurance agent, thus intrusted with the care of property, to write a valid policy upon it, indeed, it was well said in argument, that presumably it is for the interest of the insurance company taking the risk that the insured property be watched and guarded by its own chosen agent.

We conclude, therefore, that the nonsuit cannot be supported on the ground upon which the court granted it. We are also of the opinion that no other fact fatal to a recovery on the policy is incontrovertibly proved. As the action must be again tried, we purposely

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abstain from commenting upon other questions which were very ably argued by counsel, lest we might inadvertently prejudice one party or the other on the trial. It is deemed advisable to go no further on this appeal than the present exigencies of the case require us to go, leaving to both parties a clear field for future contest.

BY THE COURT. — Judgment reversed, and cause remanded for a new trial.

TAYLOR, J., took no part.

IRVINE V. ADAMS.

(48 Wis. 468.)

Negotiable instrument — evidence — surety — estoppel.

An apparent principal maker of a promissory note may show by parol that the holder knew at the time of its execution, that he was a mere surety.

An apparent principal maker of a note, known by the holder at the time of execution to be a mere surety, will not be discharged by successive usurious agreements, between the payee and principal maker of a note, for extension of the time of payment, followed by payment of the usurious consideration after the expiration of such extended time, there being no suspension of the payee's right to enforce payment.*

On a compromise between a principal maker of a note and part of his creditors, including a surety on the note, but not the holder, if the surety receives or agrees to receive and accept the compromise payment, he is estopped to deny his liability to the holder.

ACTION on a promissory note. The opinion states the facts. The defendant had judgment below.

Henry S. Magoon, for appellant. It is the settled general rule, that parol evidence will not be admitted to add to, contradict or vary the terms of a written instrument. 1 Phill. Ev. 637, 665, 668; 1 Greenl. Ev., § 275; *Foster v. Clifford*, 44 Wis. 571; 28 Am. Rep. 603; *Charles v. Denis*, 42 id. 56; s. c., 24 Am. Rep. 483; *Strachan v. Muxlow*, 24 id. 26; 12 Wend. 573; 1 Cow. 249; 1 Hill, 116; 1

*To same effect, *Howell v. Sevier* (1 Lea, 300), 27 Am. Rep. 771. See *McCloskey v. Indianapolis Manf'rs and Carpenters' Union* (67 Ind. 86), 33 Am. Rep.

Den. 400 ; 16 Wall. 566 ; 91 U. S. 291 ; 2 Pars. on Notes, 501 ; 42 Ill. 165 ; 9 Gray, 337 ; 7 Bosw. 366 ; 45 Barb. 214 ; and many other cases. The case at bar is within the rule. *Yates v. Donaldson*, 5 Md. 389 ; *Kritzer v. Mills*, 9 Cal. 21 ; *Bull v. Allen*, 19 Conn. 101 ; *Manley v. Boycot*, 2 Ell. & Bl. 46 ; *Strong v. Foster*, 17 C. B. 201 ; *Hollier v. Eyre*, 9 Cl. & Fin. 45 ; *Price v. Edmunds*, 10 B. & C. 578 ; *Perfect v. Musgrove*, 6 Price, 111 ; *Farrington v. Gallaway*, 10 Ohio, 543 ; *Slipher v. Fisher*, 11 id. 299 ; *Sprigg v. Bank of Mt. Pleasant*, 10 Pet. 265 ; 14 id. 206 ; 8 Wheat. 211 ; 1 Johns. Ch. 429 ; 6 Vesey, 328, and note ; *Bank v. Dunn*, 6 Pet. 56 ; *Brown v. Wiley*, 20 How. (U. S.) 447 ; *Rockmore v. Davenport*, 14 Tex. 602 ; *Thompson v. Ketcham*, 8 Johns. 190.

Orton & Osborn, for respondent. The surety was discharged by appellant's extension of time to the principal without his consent. That the contract for such extension was usurious will not change the rule. Though the borrower may set up usury for the purpose of avoiding a contract tainted with it, the lender cannot. This doctrine was announced in this State in the early case of *Riley v. Gregg*, 16 Wis. 672 ; and confirmed in *Austin v. Burgess*, 36 id. 192. *Vilas v. Jones*, 1 N. Y. 274, which has been regarded as holding a different rule, is expressly overruled by *Billington v. Wagoner*, 33 N. Y. 31, and *La Farge v. Herter*, 9 id. 243. *Meiswinkle v. Jung*, 30 Wis. 362, relied upon by appellant, seems to be in conflict with the other cases referred to ; and in a note by Chief Justice DIXON to *Riley v. Gregg*, in the new edition of the reports, it appears that that case was overlooked in the latter decision ; so that the question must be still regarded as an open one. Moreover *Meiswinkle v. Jung* was based upon the overruled case of *Vilas v. Jones*. Again, the contract in this case is an executed one. That a usurious contract of extension fully executed will release the surety, is held by a great number of authorities. *Danforth v. Semple*, 73 Ill. 170 ; *Myers v. First National Bank*, 78 id. 257 ; *Turrill v. Boynton*, 23 Vt. 142 ; *Scott v. Harris*, 76 N. C. 205 ; *Redman v. Deputy*, 26 Ind. 338 ; *Calvin v. Wiggam*, 27 id. 489 ; *Cross v. Wood*, 30 id. 378 ; *Grafton Bank v. Woodward*, 5 N. H. 99 ; *Austin v. Darwin*, 21 Vt. 38 ; *White v. Whitney*, 51 Ind. 124 ; *Scott v. Saffold*, 37 Ga. 384 ; *Coriello v. Allen*, 13 Iowa, 289 ; *Kelly v. Gillespie*, 12 id. 55.

COLE, J. On the face of the note, the defendant W. Thompson Adams appears to be a joint maker. But parol testimony was of

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ferred on the part of the defense, and received against the plaintiff's objection, to show that he really signed the note as surety. The first error assigned here for a reversal of the judgment, is the admission of this testimony. It is insisted by the learned counsel for the plaintiff, that to permit a party who appears to have signed a note as principal, to show by parol that he signed as surety, is a violation of the well-settled rule of evidence, that a written contract cannot be contradicted or varied by parol testimony. But where the creditor knows, when the note is executed, that a party signs as surety, then, as we understand, the great weight of authority admits parol testimony to show that fact. It was so decided by this court in *Riley v. Gregg*, 16 Wis. 676, where the question was directly presented. DIXON, C. J., in that case, says that the admission of such testimony does not vary the effect of the undertaking, but is admissible to show that the creditor, who knows the real relation of the contracting parties, violates his faith impliedly given to the surety, not to interfere with those relations so as to impair his legal rights or diminish his remedies, when he extends the time of payment to the principal. It is not necessary that it should appear from the contract itself that one signed as surety and not as principal. Suretyship, being a collateral fact, may be shown by evidence *aliunde*. *Carpenter v. King*, 9 Metc. 511.

To the same effect is the recent decision of the Court of Appeals of New York in *Hubbard v. Gurney*, 64 N. Y. 457. In this case CHURCH, C. J., examines the question at great length upon the authorities, and states, in substance, in the words of the head note, that "such evidence does not alter or vary the written contract, as the fact proved simply operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract or making a different one with the principal debtor without the consent of the surety, or from impairing the rights of the latter by releasing any security or omitting to enforce the contract when requested." It is true, in *Harris v. Newell*, 42 Wis. 687, the chief justice stated that the court entertained a very grave doubt whether one who appeared to have executed a promissory note as principal could show by parol that he signed it as surety; but this intimation was thrown out rather to invite further discussion of the question than with the purpose of shaking or overthrowing the decision in *Riley v. Gregg*. The intimation has answered its purpose, and we are all now fully satisfied that the latter case lays down the true rule upon

the subject, and is in strict accord with the weight of modern authority. It is deemed unnecessary, therefore, further to consider the question.

In this case it was claimed that W. Thompson Adams was discharged by an extension of time of payment given the firm of Maynard & Adams, who were the principal debtors, and the learned Circuit judge so decided. We think, however, that the findings of fact fail to show that the surety was discharged by a valid agreement to extend the time of payment of the note. In the second finding the Circuit Court in effect finds, that about the time the note matured, in May, 1871, the plaintiff and the defendants Maynard & Adams made a contract, by the terms of which the plaintiff agreed to extend the time of payment of the note for one year, in consideration of being paid for such extension the further sum of five per cent, in addition to the ten per cent interest which the note drew; that some time after the termination of such extended period the firm paid \$12.50 of the sum agreed to be paid for the extension, the plaintiff releasing them from the payment of the remaining \$12.50 of the consideration for the extension; also, that the payment of the note was further extended from year to year by like agreement, the firm paying for such extension each year the sum of \$12.50, the amount agreed to be received therefor by the plaintiff, until the failure of the firm in 1875; and that the surety had no knowledge of these various extensions.

Now, according to our understanding of this finding, it shows an executory usurious agreement to extend the time of payment, which, under the decisions of this court, does not constitute a "basis or consideration upon or out of which any binding promise for that purpose could arise or be created." *Riley v. Gregg, supra*; *Meiswinkle v. Jung*, 30 Wis. 361; *St. Maries v. Polleys*, 47 id. 67. It is plain that each agreement to extend the time of payment was executory in its character, and was therefore void. The plaintiff did not place it out of his power at any time to enforce a collection of the note by action. Under such circumstances the surety was not released. But if there were any doubt upon this point, the facts stated in the third finding show that W. Thompson Adams is estopped from insisting upon the defense. That finding is, that the firm of Maynard & Adams compromised with their creditors in 1875, paying forty per cent of their claims; that this note was put in as a liability of the firm on such compromise by W. Thompson

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Adams, or with his consent; that the firm paid forty per cent. of the note, but neither the plaintiff, who was not a party to the compromise, nor the defendant W. T. Adams, received any part of such payment, the sum being taken by J. L. Adams, upon a promise to pay the same to the plaintiff, which he never did. Now, if W. T. Adams treated this note at this time as an existing liability to him, and caused it to be included in the compromise, he should be estopped from saying he was not bound to pay the note in consequence of the extension. There could be no doubt of the correctness of this view if W. T. Adams had actually received the forty per cent upon it. But that he did not receive it was owing to his own laches or default. He could have demanded it of the firm, and had the full benefit of the composition. It is true W. T. Adams denies that this note was included in the claim which he presented against the firm on the compromise, and his testimony in that respect is corroborated by that of his brother, J. L. Adams. On the other hand, Maynard testified that it was so included. We shall not stop to discuss the testimony as to whether it was or not, but accept the finding of the court as correct, for certainly there is no such clear preponderance of testimony against the second and third findings of the Circuit Court as would warrant us in disregarding them.

The issue on the affidavit of the plaintiff for a writ of attachment was tried with the main issue, and fell with it.

It follows, from the views which we have taken of the case, that the judgment of the Circuit Court upon both issues must be reversed, and the cause be remanded to give judgment for the plaintiff upon them.

BY THE COURT. — So ordered.

Reversed and remanded.

QUAIFE V. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

(48 Wis. 513.)

Evidence — complaints of injured party on physical examination requested by opposite party — impeaching one's own witness.

In an action of damages for personal injuries by negligence, the plaintiff having at the defendant's request submitted to a physical examination by surgeons, *held*, (1) that testimony that judging from the examination, includ-

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ing what she said at the time, and her indications of suffering, the injury complained of existed, was admissible, although the witness swore he could discover no external evidence of it; (2) one of the surgeons, plaintiff's witness, having testified that from such examination he could not discover the injury complained of, was asked by plaintiff's counsel, under objection, whether it might not have existed without his being able to discover it, and answered that it was possible, but not probable; *held*, no error. (*See note*, p. 828.)

ACTION of damages for personal injuries by negligence. The injury complained of was a fracture of the *femur*. The opinion states the points. The plaintiff had judgment below.

F. J. Lamb, and *William F. Vilas*, for appellant. The question put to one of the physicians, as to his ability to determine whether plaintiff suffered any pain, judging from his examination *including what she said*, really called on the witness to pronounce upon the credibility of her mere assertion, as against the result of the physical examination; and it was for the jury, not the witnesses, to say how much her testimony was worth in comparison with the array of facts against her. *Wood v. Railway Co.*, 40 Wis. 582; *Griffin v. Town of Willow*, 43 id. 509; *Churchill v. Price*, 44 id. 542. The question was not properly within the limits of a medical opinion. A physician may testify whether a certain disorder which he has examined into would cause pain, and its probable character and degree. He might also, perhaps, give an opinion as to what affection or injury of the body the existence of a certain described sensation would indicate. But when he can find no disorder which in his opinion is adequate to cause physical distress, he has no better means of determining in favor of an assertion of pain by the patient than any other person. Expert witnesses can only be asked to deliver an opinion upon hypothetical questions which represent what may be fairly claimed to have been proven as facts, leaving entirely to the jury the ascertainment of the facts. *Dexter v. Hall*, 15 Wall. 9; *Reynolds v. Robinson*, 64 N. Y. 589; *Woodbury v. Obear*, 7 Gray, 467; 1 Greenl. Ev., § 440; 1 Whart. on Ev., § 452; *Luning v. State*, 2 Pin. 220; *Wright v. Hardy*, 22 Wis. 354; *Eaton v. Woolly*, 28 id. 628. It was also error to permit the plaintiffs in direct examination of Dr. Beebe, and when he had shown his inability to testify to any *fact* in their favor, to ask him whether there might not have been a fracture of the neck of the femur, which he had not been able to discover. This was in effect decid-

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ing that the jury might range the possibilities, in considering what ailed the plaintiff; and permitting them to endeavor to account for the pain on the theory of a fracture of the femur. The answer could be but a mere speculation, and its tendency was to lead away the minds of the jurors from the ascertainment of facts, and the just deductions to be drawn from facts legitimately proven. Such opinions are universally condemned in the books as inadmissible. *Kennedy v. People*, 39 N. Y. 255 *et seq.*

Lusk & Perry, for respondents.

TAYLOR, J. [Omitting some well-settled doctrine.] It was claimed by the defendant, on the trial of this action at the Circuit Court, that the plaintiff, Mrs. Quaife, was not injured to the extent asserted by her; that she was feigning sickness, lameness and debility for the purpose of enhancing the damages; and a large part of the evidence on the part of the defense was introduced to sustain that claim. During the trial Mrs. Quaife submitted to an examination by six surgeons and physicians, three selected by her and three by the defendant; and after making their examination, they were all sworn upon the trial, and all united in saying that they could discover nothing in her physical appearance which would indicate that she was suffering the pains, weakness and lameness which she claimed on her part to be laboring under, and which had been, as she claimed, continuous from the time of the accident to the day of the trial. In this state of the evidence upon this question, the learned counsel for the defendants claims that the Circuit judge erred in permitting one of the medical men summoned by the plaintiff to answer the following questions:

“Question. Do you think that you could tell whether or not she suffered pain by the movement of the hip, judging from all the examination, including what she said? Answer. I think I could. Q. Now go on and state whether in your opinion she did suffer pain? A. She gave every indication of suffering pain. Q. In your opinion did she suffer pain? A. Yes, sir; that is my opinion, that she did. This pain, if it exists, indicates some trouble in the hip joint.”

These questions were all objected to, and exception taken to the admission of the answers as evidence in the case. In order to determine whether the answers to these questions were properly

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admitted in evidence, it is perhaps necessary that the whole testimony of this witness, given as well before as after the answers, should be stated. On the direct examination, and before the above questions were asked and answered, he stated:

“I am a physician and surgeon. I assisted at the examination of Mrs. Quaife yesterday. During the examination she seemed to be quite nervous, and more or less excited; she complained of considerable palpitation of the heart. I think she said she felt it every day more or less. I assisted in the examination of the thigh and hip. I didn't find any physical indications or signs of injury.”

Here followed the questions and answers above given, and which were objected to; and immediately after answering such questions, the witness was cross-examined, and testified as follows: “I found nothing in the hip by examination; there must be some defect in the limb to produce pain, and that defect I could not find. The general opinion was that we could not find any thing. The only way I could tell that she ached was by what she said, and how she looked and appeared.” On a re-direct examination he testified: “I experimented for the purpose of detecting whether there was pain or derangement of the hip joint, by striking on the bottom of the foot; and that seemed to give her pain in the hip joint.” The foregoing is all the testimony given by this witness on the trial.

It is very earnestly insisted by the learned counsel for the appellant, that upon this evidence the questions were improper, for the reason that it was in effect asking the witness whether he believed the statement of the plaintiff, Mrs. Quaife, made at the time of the examination and as a witness on the trial, that she suffered pain. It is argued that as the witness had sworn that he could find nothing in her physical condition that indicated the existence of pain, or which suggested the possibility of such pain, his answer must necessarily be based upon what she said alone; and that if based on that alone, it could only be an opinion of the witness as to the veracity of the plaintiff.

The claim of the plaintiffs on the trial was, that Mrs. Quaife was lame in her hip, and that she suffered pain there; that she was and had been unable to use her limb as she had used it before the accident; that it was so weakened and injured by the accident that she could not for a long time use it at all for the purpose of walking; and that it was still so weak and painful as to render it unsafe for her to attempt to walk without the aid of a crutch. The ex-

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amination of physicians made upon the trial was made at the suggestion of the defendant, for the purpose of testing the truthfulness of this claim on the part of the plaintiff, and to place before the jury the real condition of Mrs. Quaife, so far as such condition could be ascertained by the experience, knowledge and skill of the expert medical witnesses. The examination was promptly submitted to by Mrs. Quaife.

The experts, after the examination, were put on the stand as witnesses, for the purpose of giving the jury the facts ascertained by them from such examination. We are of the opinion that these experts would, in this case, be in the same position as if they had been called in any other case of sickness or injury to attend a patient, and determine, so far as they could, the real condition of such patient. In this case the patient complained of pain in the hip and lameness of the limb as amongst her troubles. The experts examine the limb and hip, and find no such appearance as would indicate lameness or pain. Yet the patient insists upon the fact of lameness and pain. It becomes then a question with the experienced physician, whether such pains and lameness are imaginary, feigned or real; and to determine this, he must resort to other evidences than those to be derived from an examination of the limb itself. And in such case we think it is clearly competent for the expert to give an opinion from the general appearance, actions and looks of the patient, and what she says at the time in regard to her condition.

Although the examination in this case was not made for the purpose of giving medical advice, still it was made for the express purpose of ascertaining whether the plaintiff was suffering from the existence of a present disease, and the nature of such disease; and for the ascertainment of that object the statements of the patient, or person examined, would be as necessary for the enlightenment of the medical experts as though the examination were made with the purpose of administering remedies. It is true that statements made by the person claiming to be injured, made pending an action to recover damages for such injury, might not be entitled to the same weight as if they had been made before an action commenced and for the purpose of getting medical advice; still this objection does not go to the competency of the evidence, but to its credibility.

Both parties on the trial seem to have conceded that the state-

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ments made by the plaintiff to the examining physicians were competent evidence, both for and against her ; and this was undoubtedly the correct view of the case. The experts in making the examination would naturally and necessarily, in order to make a fair one, inquire of the person to be examined whether she suffered pain or otherwise, where the pains were located, how long they had existed, and such other questions as their superior knowledge and skill would suggest for the purpose of determining whether her assumed illness was real or feigned ; and having made all proper physical examinations, they would form an opinion from her statements and such physical examinations, whether the disease was feigned or real. If in order to make a fair examination of the plaintiff by the experts, it was necessary or proper to interrogate her at all as to her present condition, then it seems to us that it is clear that in giving an opinion as to her present condition, her answers to such inquiries must necessarily be taken into consideration, as well as her actions and appearance.

We think the rule applicable to this case is correctly stated by Chief Justice BIGELOW in the case of *Barber v. Merriam*, 11 Allen, 322-324 : “ The opinion of a surgeon or physician is necessarily formed in part on the statements of his patient, describing his condition and symptoms, and the causes which have led to the injury or disease under which he appears to be suffering. This opinion is clearly competent, as coming from an expert. But it is obvious that it would be unreasonable, if not absurd, to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded. Such a course of practice would take from the consideration of court and jury the means of determining whether the judgment was sound, and his opinion well founded and satisfactory. * * * The party producing the witness, and who relies on his opinion, should be allowed the privilege of showing that his testimony, as an expert, is the result of due inquiry and investigation into the condition and symptoms of the patient, past and present. * * * The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury, can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded.” See, also, *Bacon v. Charlton*, 7 Cush. 581-586; *Aveson v. Kinnaird*, 6 East,

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196; *Thompson v. Trevanion*, Skin. 402; 1 Greenl. Ev. 102; *Palmer v. Crook*, 7 Gray, 418; *Rowell v. City of Lowell*, 11 id. 420; *Railroad v. Sutton*, 42 Ill. 438; *Denton v. State*, 1 Swan, 297; *Le Marchant's Gardner Peerage* case, 78, 175, 178.

It has been held in some cases, that statements of the kind above mentioned, made after suit brought, should not be received for any purpose, not even for the purpose of in part founding an opinion upon them by an expert. We think, however, the true rule on this point is also stated in the case first above cited. Chief Justice BIGELOW, in his opinion, page 326, says: "It is suggested, in behalf of the defendant, that the statements in the present case were made by the plaintiff after the commencement of the action. But we do not think that for this reason only they ought to have been rejected. It was a circumstance which may have detracted from the weight of the evidence of the opinion of the physician, so far as it was founded on these statements. But as the statements were made to a medical man, for the purpose of receiving advice, they were competent and admissible." And so, in this case, the defendant having called for personal examination of the plaintiff, by expert witnesses, for the purpose of determining whether the plaintiff was suffering from disease or injury, and with a view of having those witnesses testify as to the results of such examination, and give their opinions if called upon, the plaintiff had the right to have them take into consideration her statements made upon such examination, in making up their opinions as to her present condition.

It would have presented a different question, if the plaintiff on her part, without the knowledge or presence of witnesses for the defendant, had called experts to examine her as to her present condition, for the purpose of giving evidence on the trial, and not for the purpose of giving medical advice. In that case the objection would perhaps have been well taken, that in forming an opinion as to her condition the witnesses should not be allowed to take into consideration her statements made at such examination. In such case the statements would be subject to a suspicion that they were made for the purpose of getting an opinion favorable to her. In the present case, the examination was not sought by her, and her statements were made in answer to interrogatories put by experts, who are supposed to be impartial, if not hostile, to her, and all her statements were made subject to a full cross-examination by the

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experts, so that there would be very little probability that they would be misled or influenced by any colored or false statements. We think the questions and answers were admissible, and that it was for the jury to say what weight should be given to the opinion under all the circumstances.

It is objected that the court erred in permitting the following question to be put and answered by one of the plaintiff's witnesses, Dr. Beebe: "Might there not have been a fracture of the neck of the femur, and you not be able to discover it?" Answer. "That may be in the range of possibilities, but not probable; the usual organic changes and usual symptoms accompanying that fracture were not present."

This witness was one of the six who had made the personal examination of the plaintiff during the trial, and, although called by the plaintiff, had testified that in such examination he had discovered nothing in her physical condition which indicated that she was suffering pain from the alleged injury at the time. The witness, though necessarily called by the plaintiff, as one who had been selected by her to assist at the examination, did not testify very favorably to her; and it was in the discretion of the court whether a question in the nature of cross-examination should be allowed to be put by the party calling him. It is not denied but that the question would have been a proper one to put to the witness on cross-examination had he been called by the defendant. The object of the question was, to show that an injury might exist, and did in fact exist, although there were no outward manifestations.

This exact question was before the Supreme Court of Massachusetts in the case of *Rowell v. City of Lowell*, 11 Gray, 420; and that court held that such a question was proper upon the cross-examination of a surgeon testifying as an expert. In the present case, although the question was put upon direct examination, it was put to a witness who, although called by her, had not testified favorably; and there was no error, therefore, in permitting the question.

[Omitting minor points.]

Judgment affirmed.

NOTE BY THE REPORTER. — This decision is supported by that in *Matteson v. N. Y. Cent. R. R. Co.*, 85 N. Y. 487. The injury occurred on the 7th of July, and consisted in concussion of the spine. Declarations made by the injured person in the following October, after suit brought, to physicians while they were examining her to ascertain her condition, were held admissible in her behalf. The court said: "Her complaints and representations of pain and suffering, together with her appearance and conduct, necessarily formed the basis of their judgment." "This is the case, notwithstanding the examinations referred to were

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made by the physicians after the suit was commenced, and with a view as to their testifying therein as to the result of their examinations. It does not appear that the patient knew that such was their object, and if she did know it the jury were to judge whether her representations were false or her testimony collusive." So in *Brown v. N. Y. Cent. R. R. Co.*, 32 Id. 597, testimony that the injured party complained "all the time since the injury," was held admissible. To the same effect *Caldwell v. Murphy*, 11 N. Y. 416, where the complaints were made during ten or eleven days after the injury, and in *Werely v. Persons*, 28 Id. 344, where they were made during two or three weeks after the injury. In *Aveson v. Kincaid*, 6 East, 188, the action was on a policy of insurance on the plaintiff's wife's life, the defense fraud. The wife's declarations as to the state of her health were held receivable. Lord ELLENBOROUGH said: "What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing."

In *Chapin v. Marlborough*, 9 Gray, 244, the statement of the plaintiff to his physician, several months after the injury, of the cause of injury and that he then suffered pain, was excluded as evidence of the fact of the injury. The court said: "Any thing in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing malady." Citing *Bacon v. Charlton*, 7 Cush. 586. In the latter case the complaints were three or four days after the accident.

In *Kennard v. Burton*, 25 Me. 39, the complaints were made while on the way home after the injury. The court said: "By the time in question is not intended the time of injury, but the time when it is material to prove a condition of bodily or mental suffering. And that may be material for weeks and perhaps months after an injury has been inflicted." To the same effect *Gray v. McLaughlin*, 26 Iowa, 279. And in *Illinois Cent. R. R. Co. v. Sutton*, 42 Ill. 498, the court said: "Not only the opinion of the expert, founded in part upon such data, is receivable in evidence, but he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation and give it the character of *res gestæ*."

In *Denton v. State*, 1 Swan, 279, it was held that the statements of a wounded man, when his wounds were being examined, in explanation of the character and extent of his injury, being part of that transaction, so far as they are necessary to communicate information upon the subject, are admissible in evidence in a prosecution growing out of the conflict in which the wound was given, but the statement of the name of the person who inflicted the injury, or as to the instrument with which it was done, constitutes no part of that information, and is not admissible.

In *A Miss Goodwin v. Harrison*, 1 Port. 80, an action for giving her a dose in some toddy to intoxicate and inflame her passions, her complaints to her mother the next morning were admitted "as being an exception from the general rule, founded upon the necessity of the case." This was disapproved, BRADY, J., dissenting, in *Spatz v. Lyons*, 55 Barb. 476.

In *Lush v. McDaniel*, 13 Ired. L. 485, it was held that the declarations of a sick person to a physician at any particular time of his sufferings and condition, are evidence so far as they refer to the time at which they are made, but not so far as they refer to their state and condition at any past time. The court said: "It is natural evidence upon those points, as her appearance, seeming agony of body, and other physical exhibitions would be." "But the account given by her as to previous symptoms and their origin and duration, would not influence the mind of the physician upon the question as one of science, but would be acted upon by him only in proportion to his belief of its truth, either from his confidence in the narrator or from its coincidence with his judgment on that point, formed from the existing stage of the malady." Exactly the same doctrine was declared in *Rogers v. Crain*, 30 Tex. 284.

The conclusion, therefore, is: *First*. That the complaints and statements of the injured party at the very time of the occurrence, not only as to bodily suffering but as to the circumstances of the occurrence, are admissible as *res gestæ*. *Second*. That the statements of the injured party subsequently and not substantially at the time of the occurrence, as to the circumstances of the occurrence, are not admissible, whether made to a physician or to a non-expert. *Third*. Complaints and statements of the injured party as to his present physical condition, although subsequently to the occurrence and indeed after suit is brought for the injuries, are admissible, whether made to a physician or to one who is not an expert.

BLUMER V. PHOENIX INSURANCE COMPANY.

(48 Wis 535.)

Insurance — fire — continuing warranty.

On an application for fire insurance the applicant was asked "Is there a watchman in the mill during the night? Is the mill ever left alone?" The answer was, "no regular watchman, but one or two hands sleep in the mill." *Held*, under a warranty policy, a continuing warranty. (*See note*, p. 831.)

ACTION on a policy of fire insurance, containing a warranty of the truth of all answers in the application. The opinion states the point. The defendant had judgment below.

M. P. Wing and G. C. Prentiss, S. U. Pinney and P. L. Spooner, for plaintiffs.

Cameron, Losey & Bunn, Jenkins, Elliott & Winkler and D. S. Wegg, for defendant.

ORTON, J. The opinion of the court upon the first hearing of this cause (45 Wis. 622), expressed at the time, and still expresses, the views of this court upon all of the questions considered therein. The re-argument has not weakened that opinion, and, we think, has tended strongly to confirm it.

The leading question is a very narrow one, and rests upon the logical relation and commonly accepted meaning of the question and answer upon which the verdict was ordered for the defendant, viz. : "Is there a watchman in the mill during the night? Is the mill ever left alone?" The first part of this question is, in itself, literally incomplete, and insufficient to express the inquiry whether a watchman is *constantly kept* in the mill during the night; for it is, whether *at any time* during the night there is a watchman in the mill. The other part of the question. "Is the mill *ever* left alone?" supplies this literal deficiency; and both parts together express the full inquiry, whether there is a watchman in the mill *all the time* during the night. This meaning is intensified by the language "is the mill *ever* left alone?" This meaning of the question is so obvious as to scarcely bear discussion. Its purpose most clearly was to ascertain whether any person was kept in the mill in charge of it and to watch it during the night, as a precau-

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tion against fire. The question most naturally and logically suggests such an answer as would satisfy the object and purpose of the inquiry ; and we think such an answer was made. "No *regular* watchman, but one or two hands sleep in the mill," — that is, one or two hands are *constantly* in the mill, for they sleep there during the night, and *they* act as watchmen.

This answer satisfies the inquiry in every particular, and is directly responsive to the question. Without the last part of the answer, it is very clear that the first part would not be responsive to the first part of the question, "Is there a watchman in the mill?" "No *regular* watchman." The insured is not asked whether there is a *regular* watchman in the mill, and therefore this part of the answer is not responsive.

The question is, whether there is a watchman of any kind in the mill during the night, or, is the mill *ever* left alone? The answer is directly responsive to the whole question, and its obvious meaning is, "Yes, there is a watchman in the mill during the night, for one or two men sleep in the mill who act as such, and therefore the mill is *never* left alone."

It is conceded by the learned counsel of the appellants, that, if the answer was responsive to the question, then both the question and the answer were material to the risk, and constituted a warranty that would continue during the life of the policy, as a matter of law ; and such is unquestionably the law. "The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not therefore open to be tried by the jury." May on Ins., § 185.

The learned counsel for the appellants, in speaking of this rule, says in his brief, and very correctly : "The essence of this rule is an implied assent of the insured to the insurer's view as to what is material to the risk. The question must therefore indicate clearly what the insurer does deem material."

Tested by this rule, can there be any doubt that the insurer intended this inquiry to be material, and that the insured assented to this view? This being our opinion of the materiality of both the question and answer, and that the language is not susceptible of any other construction, or indeed liable to any doubtful or uncertain construction, the positions assumed by the learned counsel, and their very able arguments, and the numerous authorities cited

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by them in their support, upon any other premises or hypothesis, are inapplicable and need not be considered.

This opinion upon this important question might be greatly extended, and perhaps ought to be, if for no other reason, to show proper deference to the distinguished counsel, and their very able and exhaustive treatment of the subject on the argument; but the former opinion of the court by Mr. Justice LYON is so full, fair and satisfactory, that any thing further would be a mere repetition and supererogation.

[Omitting an unimportant point.]

The judgment of the Circuit Court must be affirmed, with costs.

Judgment affirmed.

TAYLOR, J., dissenting

NOTE BY THE REPORTER.—On the former hearing, LYON, J., observed:

"These views seem to be sustained by the great weight of authority; but only a few of the cases will be mentioned. In *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, the plaintiffs, in their application for insurance, answered the following question in the affirmative: 'Is there a watchman in the mill during the night?' It was held that this answer was 'an exact, clear and certain engagement by the insured that they will keep a watchman in their mill through the hours of every night during the week,' and that a non-compliance therewith was fatal to an action on the policy. The same doctrine was held in *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 285.

"In *Houghton v. Ins. Co.*, 8 Metc. 114, the questions, 'Is a watch kept constantly in the building? If no watch is constantly kept, state what is the arrangement respecting it,' were answered by the insured in their application as follows: 'No watch is kept in or about the buildings; but the mill is examined thirty minutes after work.' Upon the question whether this representation of the usual practice amounted to a condition or stipulation that it should be continued, Chief Justice SHAW, delivering the opinion of the court, said: 'It was ruled at the trial, and the whole court are now of the opinion, that as his examination was manifestly intended as a substitute for a constant watch; as it was one which the assured had it in their power to make or cause to be made; as it was one of the precautions tending to secure the property against danger of fire, and tending to its safety, it was one which, as a general practice, the assured was bound to follow, although an occasional omission, owing to accident, or to the negligence of subordinate persons, servants or workmen, not sanctioned nor permitted by the assured, or by their superintendent, manager or agent, might not be a breach or non-compliance.'

"To the same effect are the cases of *Worcester v. Ins. Co.*, 9 Gray, 27; *Clark v. Ins. Co.*, 8 How. 235; *Ripley v. Ins. Co.*, 30 N. Y. 136; *First Nat. Bank v. Ins. Co.*, 50 Id. 45, and other cases cited in the brief of counsel for the defendant. In all of these cases, the questions and the answers of the insured thereto, as in this case, were contained in the application, and were in the present tense; and in each of them the answer was held to be either a warranty or a representation that the same conditions should be substantially maintained during the life of the policy, failing which, the policy was void.

"In some of these cases, owing to peculiar provisions of the contract, such statements were held to be representations and not warranties; but in those cases it was held that the representations were continuing, and the failure to use the precautions against fire, as represented, would, if material to the risk, defeat a recovery on the policy. *Houghton v. Ins. Co.*, 8 Metc. 114, is such a case. The same doctrine was fully recognized by Mr. Justice PAINE in *May v. Buckeye Ins. Co.*, 25 Wis. 291."

In the *Ripley* case above cited, to the question whether there was a watchman in the building during the night, the assured answer, "there is a watchman nights." Held, com-

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tinuing, and covering from midnight Saturday to midnight Sunday. In the *First Nat. Bank* case above cited, the question was: "Watchman, is one kept in the mill or on the premises during the night and at all times when the mill is in operation, or when the workmen are not present?" Answer, "yes." *Held*, continuing.

From the dissenting opinion of TAYLOR, J., on the former hearing, we extract the following review of authorities and discussion:

"None of the cases go farther than this, that when a question relates to the manner of using a mill or other manufacturing establishment, or to the precautions taken against fire, and the answer is affirmative or negative, and the court can determine from the answer, as a matter of law, that the continuation of the custom or use, as the answer shows it to be, will lessen the risk, such answer will generally be held to be a continuing warranty, but when the custom or use is such that the court cannot say, as a matter of law, that its continuance will necessarily lessen the risk, it will not be held to be a continuing warranty unless it be expressly so agreed in the contract.

"Very many cases hold a still more strict construction against the insurance companies, upon the question of continuing warranties, than as stated above. See *Blood v. Ins. Co.* 12 Cush. 472; *Schmidt v. Ins. Co.* 41 Ill. 295; *Aurora Ins. Co. v. Eddy*, 53 Id. 213; *P. L. Ins. Co. v. Fennell*, 49 Id. 180; *N. E., etc., Ins. Co. v. Wetmore*, 83 Id. 223; *Smith v. Ins. Co.* 83 N. Y. 399; *Catlin v. Ins. Co.*, 1 Sum. 435; *O'Neil v. Ins. Co.*, 3 N. Y. 122.

"In the case of *Schmidt v. Ins. Co.*, 41 Ill. 295, Judge LAWRENCE, in giving the opinion of the court, remarks: 'It is a question upon which the authorities differ; but in view of the fact that the insurance company dictates the language of its own policy, which is therefore to be most strongly construed against it, and can, if they wish, insert a stipulation which in terms refers to the future use of the property, and do, by an express provision in this, as we presume in all policies, relieve themselves from all liability in case the risk is actually increased, we are inclined to adopt the ruling of the cases which hold that these words are to be construed in reference to the then condition of the property.'

"In the case of *Blood v. Ins. Co.*, *supra*, Justice BIGELOW says: 'But a more decisive and satisfactory indication of the intent of the parties to limit the warranty to a description of the property as it was at the inception of the contract, and not to extend it to the mode of its future use and occupation, is found in the fact that there was an express agreement by which the defendants protect themselves against any increase of risk in consequence of a change in the situation or circumstances of the property. This leaves no room for doubt that the sole object of the warranty in question was to ascertain the precise nature and condition of the property at the time the risk was proposed to the defendants in the application of the plaintiff, and to enable them to judge of its extent and character and the rate of premium at which they would insure it. But it is clear that they did not rely upon it as an executory stipulation, by which the plaintiff was to be bound after the contract was entered into. To guard against any increase of risk which might arise from any change in the structure or use of the property, they relied upon a special agreement designed for that purpose only. If they relied on the warranty, such an agreement was superfluous and useless. In order, therefore, to give effect to both clauses in the contract, it is necessary to construe the warranty as being affirmative only, and not intended to apply to the future condition of the property.' In this case, the question and answer which it was claimed by the insurance company constituted a continuing warranty, were as follows: 'For what purposes occupied?' Answer: 'Formerly used as a machine shop, all of which business is now stopped, and shop fastened up, and only used for the purpose of the meeting of the band during two evenings of the week, on second floor.' On the trial, the insurance company offered to show that the building had been used for other purposes during the continuance of the risk, and contended that whether such change of occupation did or did not increase the risk, it was a breach of the warranty; the evidence was rejected; and the Supreme Court, on appeal, affirmed the ruling of the trial judge.

"In the case of *Schmidt v. Ins. Co.*, *supra*, the policy itself contained the following statement: 'No fire in or about the building, except under kettle securely imbedded in masonry (and used for heating water), and made perfectly secure against accidents.' At the time of the loss, it was proved there were two stoves in the building, in which fires had been kept during the currency of the policy and before the loss. The buildings insured were a tannery and bark mill.

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In *Ins. Co v. Eddy, supra*, it was insisted that the policy contained a warranty that no stoves should be used in a building insured as a flax factory. The application contained the following questions and answers: 'How is the building warmed? If any stoves and pipes, how are they secured?' To this it was answered: 'No stoves used.' The insured agreed in the application, if any untrue answer was given therein, the insurance was to cease, and the policy to be of no effect. After the policy was issued, a stove was used in the building for warming it. The company insisted there was a breach of the warranty that no stoves should be used for warming purposes. The court said, approving the case in 41 Ill., *supra*: 'The use of the stove was not a breach of the warranty; but if used recklessly, it might be regarded as increasing the risk.' This was a very strong case against construing the statement of the insured into a continuing warranty. The building insured was a flax factory; the fact as to whether it was warmed by a stove or not was of peculiar importance; and the evidence on the trial tended strongly to show that the fire was probably caused by the use of the stove. The case, in all its aspects, presented a much stronger one in favor of the insurance company than the one at bar.

"*Smith v. Ins. Co.*, 32 N. Y., 399 is a strong case against the construction given to the policy in this action. In that case, the policy itself contained a statement that the building insured 'was used for winding and coloring yarn, and for storing spun yarn.' This, the court say, 'was undoubtedly a warranty of its then present use, and it was true at the time the insurance was made.' Pending the running of the policy, the use was changed, but it was not proved that the change increased the risk. The court below nonsuited the plaintiff, holding the statement above cited a continuing warranty. Justice DAVIS, who delivered the opinion in the Court of Appeals, says: 'A distinction was made in the court below between the use of the word 'occupied' and the word 'used,' in the description of the policy, as to the effect on the question of continuing warranty; but to my mind the suggestion is without force. Both relate to the present actual use of the property, and are, when so applied, synonymous in intent and meaning. If the courts do not find a warranty in the phrase 'occupied in a particular manner,' it would be overstraining to find one in the words 'used in a specified way.' If an insurance company desires to protect itself by a warranty as to future or continuing use in the same manner as when insured, it may always do so by language the object and meaning of which will be understood by both parties; and the courts should not construe words which are fully satisfied as a description of a present use or condition, into a promissory warranty, unless the inference is natural and irresistible that such was the design of both parties.'

"In the case of *Cutler v. Ins. Co.*, 1 Sumn. 442, Justice STORY says: 'Suppose a policy against fire underwritten on a house of A in Boston, described as a dwelling-house, or as occupied as a dwelling-house: would the policy be void if the house should cease for a time to have a tenant? Such a doctrine has never, to my knowledge, been asserted, nor should I deem it maintainable.'

"In *Power v. Ins. Co.*, 8 Phila. 556, the following questions and answers were in the application: 'Is a watch kept on the premises? Is there a good watch clock? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning, till he returns to his charge in the evening?' To these several questions the plaintiff made but one answer. 'There is a watchman when the mill is not in use.' The policy contained the clause making the application a warranty.

"The judge, in commenting upon these questions and answers, says: 'I cannot say that the answer was intended by the parties as a contract that the insured should always keep a watchman at the mill when it was not going, and that his sole duty during such times should be to watch against fire, always awake and always present; nor can I say that the law constructs such a contract out of the answer. The answer is very loose in its terms, and the insurers accept it in all its looseness, and then as of little importance, and do not insert it in the policy for further guidance, but file it away in their office. It makes no approach to a definition of the functions to be performed by the watchman.' The remarks of the learned judge in this case will apply with equal and greater force to the case at bar. Here the answer negatived the fact that any watchman was kept, and gave an answer not directly responsive to the question, which was accepted as sufficient by the insurer, inserted in the application by its agent, sent to its office and filed there, considered at the

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time of no importance, and only brought to the knowledge of the insured as being of any importance, when it is used on the trial to defeat his policy.

"In the case of *Boon v. Aetna Ins. Co.*, 40 Conn. 588, the court says: 'To this it should be added that it is the duty of an insurance company seeking to limit the operation of its contract of insurance by special provisions or exceptions, to make such limitations in clear terms, and not leave the insured in a condition to be misled. The uncertainties arising from provisos, exceptions, qualifications and special conditions in or indorsed upon policies have been often condemned; and such special modifications are justly characterized as traps to deceive and catch the unwary. An insured may be reasonably held entitled to rely on a construction favorable to himself, when the terms will rationally permit it. Where, as in this case, such construction gives a signification *ejusdem generis* with all others with which it is found associated, and in harmony with the general character and purpose of the provisions in which they are found, he is clearly entitled to insist on such construction.'

"*Benham v. United Guaranty & Life Assurance Co.*, 7 Exch. 744. In this case the policy recited, that as the basis of the contract for such guaranty, the plaintiff had lodged at the office of the defendants a certain statement in writing, containing a declaration, signed by the plaintiff, of the truth of the answers thereby given to the questions therein contained. Among the questions put, were the following: 'Checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed.' Ans. 'Examined by finance committee every fortnight.' The policy guaranteed the integrity of the secretary of a literary institution; and the loss occurred by reason of the omission to examine the accounts in the manner stated. POLLOCK, C. B., in deciding the case, says: 'The manner in which this question is put, the other questions with which it is associated, and the decisions upon policies of insurance, lead me to the conclusion that the answer was not expected to be upon the part of the office, or meant to be on the part of the plaintiff, any thing more than a declaration of the course intended to be pursued; and if that answer was made *bona fide* and honestly, it does not prevent the plaintiff from maintaining this action.' The chief baron, on the argument, gives this reason for his conclusion: 'Suppose that instead of examining the accounts every fortnight, the institution had adopted, as a more convenient mode of securing the fidelity of the secretary, the practice of sending the money every day to a banker, and that on one occasion, when some was left, the secretary had absconded with it: would the policy be avoided? If it is a warranty, it must be construed strictly; and therefore, although the institution had found out a better mode of checking the accounts, they would nevertheless be obliged to go through the idle ceremony of having them examined by a finance committee.'

"This case illustrates in a clear manner the obstinacy with which courts resist a construction of a contract of insurance, which will create a warranty as to future conduct, even in matters of vital importance to the insurer, and shows that in that court, at least, nothing but the most clear and explicit language will be held sufficient to create such warranty.

"The foregoing cases and the following all show that the courts uniformly refuse to give a construction to a policy of insurance which will create a continuing warranty, unless the terms of the contract are so explicit that it is not susceptible of any other reasonable construction. *Parker v. Ins. Co.*, 10 Gray, 308; *W. M. Life Ins. Co. v. Shultz*, 73 Ill. 586; *Gilliat v. Ins. Co.*, 8 R. I. 282; *Gates v. Ins. Co.*, 5 N. Y. 409; 2 Hall (N. Y.), 608; 14 Barb. 545; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 558; *Provident Life Ins. Co. v. Fennell*, 49 Id. 180; *May v. Ins. Co.*, 25 Wis. 291; *Stout v. Ins. Co.*, 12 Iowa, 371; *U. S. F. & M. Ins. Co. v. Kimberly*, 34 Md. 294; a. c., 6 Am. Rep. 335; *Williams v. Ins. Co.*, 31 Me. 219; *Cumb. V. Mut. Pro. Co. v. Schell*, 29 Penn. St. 31; *Frisbie v. Ins. Co.*, 27 id. 335. It would be a waste of time to cite the cases in this court for the purpose of proving that it has been the uniform rule to construe contracts of insurance liberally in favor of the insured, and strictly against the companies, in all cases where it was claimed that a forfeiture had occurred in favor of the company; and the cases above cited show conclusively that the rule adopted by this court is amply sustained by the course of decisions of the highest and most learned courts both in this country and in England. To show that the exception to the rule by the decision in this case is not intended to be a new departure by this court, I refer to the cases of *Palmer v. St. Paul Fire & Marine Ins. Co.*; *Erdmann v. The Mutual Life*

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Ins. Co. of the Order of Herman's Sons; and *Schunck v. Gegenseitiger Wittwen und Waisen Fund*, decided since the opinion of the majority of the court was written in this case. 44 Wis. 201, 369, 376.

"The cases cited on the part of the respondent to sustain the decision of the learned Circuit judge, though some of them may conflict with the decisions above cited, and especially with those cited from the Supreme Court of Illinois, none of them go the length necessary in order to construe the answer of the plaintiff in this case into a continuing warranty.

"In the case of *May v. Ins. Co.*, 25 Wis. 304, the interrogatory and answer were both very clear and specific. The question was, 'Have you a night watchman always on duty?' And the answer was, 'We have.' The late Justice Paine says: 'Both the questions and answers in such cases purport to relate only to the then existing condition of things. Notwithstanding this, it is entirely reasonable and just to say, that in respect to those things that, according to the usual course of the business, are permanent and continuing, the parties intend to agree that they shall be kept in the same condition. The assured undertakes to make no changes in the condition or the mode of using them, outside of the usual mode of conducting the particular business.'

"In the case at bar, irrespective of the fact that there was no inquiry made of the plaintiff as to whether any person slept in the mill, and therefore he could have no means of knowing whether the company considered that fact material, it can hardly be said that one or two hands sleeping in the mill had any thing to do with conducting the business of the mill. It was so occupied, probably, for the convenience of the hands working in the mill, as well as for the convenience of the mill-owner. It was not a method of carrying on the business, nor was it apparent that it was done for the protection of the mill in any way. The fact was, as the proof shows, that the men sleeping in the mill were coopers, who had nothing to do with the running of the mill in any way.

"In the case of *Bank v. Ins. Co.*, 50 N. Y. 45, the question was also direct, and the answer responsive. The question was: 'Watchman. Is one kept in the mill or on the premises during the night, and all times when the mill is not in operation, or when the workmen are not present?' Ans. 'Yes.' In *Glendale Manufacturing Co. v. Ins. Co.*, 21 Conn. 19, the questions were: 'Is there a watchman in the mill during the night? Is there a good watch clock? Is the mill left alone at any time after the watch goes off duty in the morning, until he returns at evening?' Ans. 'There is a watchman nights. No clock. Bell struck every hour from eight o'clock P. M. till it rings for work in the morning.' In *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, the questions and answers were equally specific and responsive.

"In *Houghton v. Ins. Co.*, 8 Metc. 114, the questions were: 'Is a watch kept constantly in the building? If no watch is constantly kept, state what is the arrangement respecting it?' Ans. 'No watch is kept in or about the buildings, but the mill is examined thirty minutes after work.'

"The court in this case held that as the examination was manifestly intended as a substitute for a constant watch, as it was one which the assured had it in their power to make or cause to be made, as it was one of the precautions tending to secure the property against danger by fire, and tending to its safety—it was one which, as a general practice, the assured were bound to follow. In the cases in 9 Gray, 27, and 2 Comst. 210, the contract in express terms related to the future and did not depend upon construction. It does not seem to me possible that the court can say, from reading the questions propounded and the answer given in this case, and considering all the circumstances attending the making of the application, the nature and extent of other questions propounded and answered at the same time, the fact that the mill insured was a water-mill, and that the company did not propound any interrogatory which would necessarily call for the answer given; that the questions and answer relied on were, in the language of the court in the case of *Houghton v. Ins. Co.*, *supra*, 'manifestly intended as a substitute for a constant watch;' or in the language of the court in the case of *Smith v. Ins. Co.*, *supra*, that 'the inference is natural and irresistible that such was the design of the parties.' And unless they can be so construed, there can be no pretense that they constitute a continuing warranty. To give them such a construction is to construe the words most liberally in favor of the insurance company, which is contrary to the fundamental rule of construction when applied to

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warranties, either precedent or subsequent, in policies of insurance. There is lacking in this case an element which was controlling in the case of *Houghton v. Ins. Co.* In that case the second interrogatory was: 'If no watch is constantly kept, state what is the arrangement respecting it.' The answer was directly responsive to this question. Both parties understood that the arrangement mentioned in the answer was in place of a watch. In this case no such question is put. The company contents itself, so far as we can see from its inquiries, with ascertaining whether there was a watch during the night; beyond that it is not inquisitive. If there be a watch it is well; if there be none it is equally well, we are at liberty to suppose, because they make no further inquiry. How, then, can the court say that the company relied upon men sleeping in the mill as a substitute for a watch, or that it deemed that fact material?'

"From the foregoing cases we deduce the general rule, that the courts will not presume that the insurer deems any fact, circumstance or custom material to the risk, unless he makes a specific inquiry concerning it. We have a right, therefore, to presume that in this case the insurance company did not deem the matter of the hands sleeping in the mill or not sleeping there, material to the risk. Had they so deemed it, they would have made inquiry thereof, as a matter necessary to be known, before deciding to take the risk. That the agent noted the fact in the application opposite the questions concerning a watchman, is not sufficient to justify the court in holding that the company considered it material to the risk, and clearly would not justify the court in holding that it deemed it so material that it would hold the insured to a continuance of it, and make it an absolute warranty during the currency of the policy. It seems to me most unjust to hold that a matter which the company did not deem of sufficient importance, in taking the risk, to make even an inquiry about, should, because disclosed by way of answer to a question to which it was hardly relevant, be construed into a warranty of vital importance to the validity of the policy.

"Under the settled rules applicable to insurance contracts, warranties of a continuing kind will not be implied, but it must be made clear that both parties understood that such was its nature, and such the intention of the parties at the time the same was made. In this case, had the application made specific inquiry on this subject, the attention of the insured would have been called to it as a thing deemed material by the company, and he would have conducted himself accordingly; but no such inquiry having been made or deemed important by the company, it is unjust to the insured to hold him to a strict warranty in regard to it. That the insured did not understand that the contract bound him to keep men sleeping in the mill is clearly established by the evidence on the trial. If he is the scoundrel the insurance company now claims him to be, and he had understood that his policy would be void unless he kept men sleeping in the mill, it is impossible to believe that he would have withdrawn the men from the mill before the policy was even delivered to him. To my mind the fact that the insured did not have any men sleeping in the mill, from a time before he received his policy until the fire, is conclusive evidence that he at least did not understand that it was necessary to keep them there in order to keep his insurance good. To give it that construction now, after his property has been destroyed, as we are bound to hold, by accident and misfortune, might justly be characterized as 'setting a trap to deceive and catch the unwary.' I cannot consent to construe language so uncertain and doubtful, and which is apparently brought into the contract by mere accident, of such potency that any variation of the slightest nature shall forfeit all claim under the policy. I am strongly inclined to follow the rule laid down by the Supreme Court of Illinois in the cases of *Ins. Co. v. Eddy*, and *Schmidt v. Ins. Co.*, *supra*, that the equivocal expressions in a policy of insurance, whereby it is sought to narrow the range of the obligation the companies profess to assume, are to be interpreted most strongly against the companies. And I fully approve of the remarks of the late Chief Justice BREese, in the case of *Aurora Ins. Co. v. Eddy*, 49 Ill. 106, that 'if the underwriters have left their design or object doubtful, by the use of obscure language (and I would add, by any other means), the construction ought to be, and will be most unfavorable to them;' and also the remarks of Justice LAWRENCE, of the same court, in the case of *Ins. Co. v. Robinson*, 54 Ill. 268: 'The companies have the preparation of their own policies, the choice of language in which to express their obligations, and they show a studious solicitude to limit their liability. Their policies are prolix with provisions of this character; and

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the public must accept them or go without insurance. We have no right to censure the companies for this, and do not ; but the reading of a policy furnishes a sufficient reason for the rule of interpretation formerly laid down by this court.'

"I have no doubt that the proper manner of construing a question of this kind is in all cases to construe the meaning as applicable to the present only, unless the contract expressly declares that it shall apply to the future, whenever the company has made no special inquiry as to the fact, or whenever, though inquiry be made, the court cannot, as a matter of law, say that the continuance of the thing would necessarily lessen the risk. None of the cases cited in favor of sustaining the ruling of the Circuit judge in this case go farther than is above indicated ; and quite a respectable number of cases hold that even in case the inquiry be of a matter the continuance of which would tend to lessen the risk, still it will not be held to extend to the future, unless the contract so expressly provides."

In *Knecht v. Mut. Life Ins. Co. of New York*, Pennsylvania Supreme Court, May 7, 1879, 21 Alb. L. J. 92, cited by TAYLOR, J., in his dissenting opinion in the principal case on the latter hearing, in an application for a life insurance policy, the applicant stated "that he does not now nor will he practice any pernicious habit that obviously tends to the shortening of life." The policy contained a condition "that if any of the statements or declarations made in the application shall be found in any respect untrue, the policy shall be void." At the time of the application, applicant's habits were correct and temperate ; afterward he took to excessive drinking, whereof he died. *Held*, that the policy was not avoided.

KNAGGS V. GREEN.

(48 Wis. 601.)

Infancy — surety — when mortgage binding.

An infant gave his note, with a surety, for the purchase-money of chattels. The vendor recovered judgment thereon, which the surety paid. The infant gave him his note therefor, secured by mortgage on the same chattels. That mortgage was held valid as against a purchaser of the chattels from the infant, with knowledge of the mortgage.

REPLEVIN for a span of horses. The opinion states the facts. The plaintiff had judgment below.

B. F. French and *R. J. MacBride*, for appellant. An infant may disaffirm and avoid his chattel mortgage at any time before he becomes of age, and within a reasonable time thereafter. Tyler on Inf., etc., p. 69, § 30 ; Schouler's Dom. Rel. 546 ; *Willis v. Twambly*, 13 Mass. 204 ; *Shipman v. Horton*, 17 Conn. 481 ; *Bool v. Mix*, 17 Wend. 119. The sale and delivery of the mortgaged property to a third person is such a disaffirmance. Tyler on Inf., p. 70, § 31 ; *Chapin v. Shafer*, 49 N. Y. 407 ; *State v. Plaisted*, 43 N. H. 413 ; *Mustard v. Wohlford*, 15 Gratt. 329 ; *Skinner v. Maxwell*, 66 N. C. 45 ; *Derrick v. Kennedy*, 4 Port. 41 ; *Allen v. Poole*, 54 Miss. 323 ;

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Dixon v. Merritt, 21 Minn. 196 ; *Miller v. Smith*, 3 N. W. Rep. 942. It is only where the infant is still in possession of the consideration when he comes of age, that he is required to return it as a condition of his right to disaffirm. Tyler on Inf., p. 178, § 37 ; *White v. Branch*, 51 Ind. 210 ; *Chandler v. Simmons*, 97 Mass. 508 ; *Gibson v. Soper*, 6 Gray, 279 ; *Boody v. McKenney*, 23 Me. 517 ; *Fitts v. Hall*, 9 N. H. 441 ; *Price v. Furman*, 27 Vt. 268 ; *Shaw v. Boyd*, 5 S. & R. 309 ; *Tucker v. Moreland*, 10 Pet. 65-74.

James O'Neill, for respondent.

COLE, J. Both parties in this case claimed the horses in controversy through contracts made by George Field, a minor. The plaintiff claims under a chattel mortgage given by the minor under the following circumstances : One Shurtleff sold Field the horses for \$300. Field paid only \$200 down, and gave his note, signed by the plaintiff as surety, for the balance of the purchase-money. When the note became due, Field was unable to pay it, and it was put into judgment. The plaintiff satisfied the judgment. Field then executed a note and chattel mortgage on the horses for the amount which the plaintiff had paid for him. This mortgage was duly filed in the town clerk's office where the horses were, and where Field resided. A few months after these transactions took place, while Field was a minor, he sold the horses to the defendant. It appears very clearly, from the testimony of the defendant, that he knew when he purchased the horses that there was a mortgage on them ; but he assumed that the mortgage was not good for anything, because executed by a minor. There is really no room for dispute about these facts, upon the evidence ; and the Circuit Court directed the jury to find for the plaintiff. The inquiry is whether that direction was warranted by the facts of the case. It is obvious that there are two conflicting titles to the property derived from the minor ; and the question is, which is to be preferred ?

It is claimed on the part of the plaintiff, that his title should prevail ; that because he, as surety, had to pay a part of the purchase-money, he ought to be subrogated to the rights of Shurtleff, the vendor. It is argued that if Field had given a chattel mortgage on the horses to his vendor, to secure a part of the purchase-money, he would not be allowed to avoid the mortgage on the ground of infancy, without rescinding the contract and restoring the property ;

consequently, that a purchaser from him, with full knowledge of the mortgage, should stand in no better position than the minor would have done in the case supposed. We are inclined to adopt this view as correct. It seems to us there could be no doubt, if Shurtleff had taken a mortgage on the horses from the minor to secure a part of the purchase-money, that he could enforce it. For as we understand, the law is well settled that an infant who has purchased personal property, and given a mortgage upon it to secure the purchase-money, or a part of it, cannot avoid the mortgage under the plea of infancy, without rendering void the sale and losing his rights under it. *Heath v. West*, 28 N. H. 101; *Curtiss v. McDougal*, 26 Ohio St. 66; Tyler on Inf., etc., 78.

In *Curtiss v. McDougal*, which is a case very much in point, the court say: "Without stopping to discuss the general disabilities or privileges of infancy, we hold that where an infant purchases a chattel, and at the same time, and in part performance of the contract of purchase, executes a mortgage on the purchased property to secure the payment of the purchase-money, it is not within the privileges of infancy to avoid the security given without also avoiding the purchase. If in such case the infant would rescind a part, he must rescind the whole contract, and thereby restore to his vendor the title acquired by the purchase. The privilege of infancy may be used as a shield, but not as a sword; and in such case, if the infant sells the mortgaged property, the purchaser takes it subject to the mortgage." In *Callis v. Day*, 38 Wis. 643, the same principle was applied to a purchase of real estate by infants, and giving back notes and mortgage for the purchase-money. This court decided that the contract was not void but only voidable, and the fact that the infants retained possession of the property after reaching their majority was a ratification of the whole contract and made it binding upon them. See *Skinner v. Maxwell*, 66 N. C. 45; *Gorey v. Burton*, 32 Mich. 30. The authorities cited on the brief of defendant's counsel certainly show that an infant may avoid a mortgage given for a precedent debt; but manifestly such a mortgage stands upon very different ground from one given for the purchase-money.

It remains, then, to inquire whether the plaintiff, upon the established facts, can have the benefit of the principles of law which we have been considering. As a surety, as we have already observed, he paid a part of the purchase-money of the horses. The

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chattel mortgage was given to him by the minor for the money so paid. It seems to us that the indebtedness so contracted should be treated, as it really was, as a debt for a part of the purchase-money. If we look at the essence of the transaction, and not the form, this is what it amounts to. The plaintiff therefore is entitled to hold the property as against the defendant, who purchased of the infant with full knowledge of the existence of the mortgage. In other words, the defendant must be deemed, in the language of the court in *Curtiss v. McDougal*, to have taken the property subject to the mortgage. The plaintiff's title is the elder one, and has superior equities to support it. This view is decisive of the case.

The point made that there was no sufficient demand of the horses, and refusal, before the action was brought, seems to us too clearly untenable to require discussion.

BY THE COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

JENKINS V. MCCURDY.

(48 Wis. 693.)

Real property or personal?

Slabs, sawdust, shavings, and other refuse used to fill up low or marshy ground, are realty, but slabs and pieces of lumber suitable for firewood, piled up on land, and intended to be used and removed as firewood, are personalty.

SUIT for injunction. The opinion states the case. Defendant had judgment below.

Finch & Barber and W. R. Barnes, for appellants.

G. W. Cate, for respondent.

ORTON, J. This action is brought to enjoin the defendant from entering upon the lands of the plaintiffs and removing earth or certain filling material, which had become part of the soil, and for the value of such material which has been thus removed. The defendant, by his answer, admits his entry upon the lands of the

plaintiffs and removal of certain material therefrom, which he insists had not become a part of the soil or attached to the freehold, but consisted of firewood, piled up and so placed upon the premises as to be personal property, and that he was the owner of the same, and had the right to so enter upon the premises of the plaintiffs and remove it. This case involves the small amount of about nine dollars, and only one question, which is a mixed one of law and fact, and depends entirely upon the facts in proof, and will therefore be but briefly considered.

It appears that the plaintiffs purchased the premises of one Thompson; that at that time the material in question was upon the surface of the soil, either as firewood or filling; and that afterward Thompson sold said material to the defendant, and the defendant entered the premises and removed a part of such material therefrom. The character of this material in its nature and uses, its situation upon the land as being actually and physically attached or detached, and the intention of the owner when it was so placed in respect to its use, are questions of fact necessary to be considered in determining the question of law as to whether this material had become a part of the realty, and passed by deed to the plaintiffs, or whether it was personal and movable property, and was sold to the defendant, and he thereby became the owner. The facts agreed upon, the questions of law are neither difficult nor doubtful. That which is in its nature otherwise personal, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title of the realty. Tyler on Fixtures, 59, 116; Ewell on Fixtures, 31; *Conklin v. Parsons*, 2 Pinney, 264.

The only question in this case is, Does the evidence show the material to have been "slabs, sawdust, shavings and other refuse matter" used to fill up low and marshy ground near the mill, as claimed by the plaintiffs, or slabs and pieces of lumber suitable for firewood, and piled up on the premises and intended to be used and removed as such? On this question depends the legal conclusion that the material in question is, or is not, personal or real property; and on this question the evidence is conflicting and contradictory. The Circuit Court found that the facts justified the conclusion that the material was personal property and belonged to the defendant, and made a special finding of the facts upon which such conclusion was based. Against these findings there does not appear such a

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clear preponderance of the evidence as would warrant us in reversing them. *Green v. Feil*, 41 Wis. 620, and numerous other cases in this court, make this the true test for the exercise of this right by this court.

BY THE COURT. — The judgment of the Circuit Court is affirmed, with costs.

Judgment affirmed with costs.

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ACCEPTANCE.

Oral.] See NEGOTIABLE INSTRUMENTS, 18.

ACCORD AND SATISFACTION.

1. **Acceptance of less sum for greater — payment of costs.]** In an action on a liquidated debt of \$299, the creditor orally agreed to accept \$150 in full if the debtor paid the costs, and received the \$150. The debtor subsequently paid the costs. *Held*, a good accord and satisfaction. *Mitchell v. Wheaton* (Conn.), 24.
2. **Note of partner for part of firm debt.]** A creditor of a dissolved partnership accepted the note of one of the partners for a portion of his demand, in discharge of the maker from liability for the partnership debt; *held*, an effectual release. *Luddington v. Bell* (N. Y.), 601.

ACQUIESCENCE.

See INJUNCTION, 156.

ACTION.

1. **Money had and received by forgery — essentials of — married woman.]** In an action against several, including a married woman, for money had and received by one by means of a forgery to which all were parties, it is necessary to a recovery against all, to show that all were interested in the money received; mere complicity in the forgery will not charge any in such an action; and the married woman could not be rendered liable without showing a contract by her in her separate business, or for the benefit of her separate estate, or for which she had charged her separate estate. *National Trust Company v. Gleason* (N. Y.), 632.
2. **When maintainable under State statute for negligently causing death on high seas.]** Under a statute of New York, giving a right of action for wrongfully or negligently causing the death of any person, an action may be maintained for negligently causing the death of a citizen of New York on the high seas, on a vessel hailing from and registered in a New York port, and employed by the owners at the time in their own business *McDonald v. Mallory* (N. Y.), 664.

Ejectment for street.] See MUNICIPAL CORPORATION, 499.

ACTION — *Continued.*

Joint, for nuisance.] *See* NUISANCE, 566.

—— for trespass.] *See* TRESPASS, 528.

To reform insurance policy.] *See* INSURANCE, 607, 655.

To reform deed.] *See* DEED, 613.

See CONTRACT, 648, 705; EXECUTORS AND ADMINISTRATORS, 10; MUNICIPAL CORPORATION, 867; REPLEVIN, 211.

AGENCY.

1. Inconsistent employments.] An insurance agent, who is also employed by the owner of property to watch it, may bind the company by a policy of insurance thereon. *Northrup v. Germania Fire Ins. Co.* (Wis.), 815.

2. Representations of agent at public sale — how far principal bound.] An agent of a corporation, making public sale of land for his principal, under a mortgage, in answer to inquiry represented that possession would be given within three months. Relying on this, the plaintiff purchased the premises, but not obtaining such possession within that time, and having lost the rents and incurred expense in getting possession, he brought an action of damages against the corporation therefor. *Held*, not maintainable, in the absence of proof of fraud. *Lamm v. Port Deposit Homestead Association* (Md.), 246.

See USURY, 140.

ALIMONY.

See MARRIAGE, 440.

ALTERATION.

See NEGOTIABLE INSTRUMENTS, 129, 143, 370.

ANCIENT LIGHTS.

The doctrine of ancient lights does not prevail in Kansas. *Lepore v. Luckey* (Kans.), 196.

ASSAULT.

Self-defense in one's business office.] M., a man who carried concealed weapons, and was reputed to be quarrelsome and dangerous, and who was stronger than the defendant, entered defendant's business office, and abused him with opprobrious epithets. Defendant ordered him to leave, but he refused, and continued the abuse. Defendant then pushed him with his open hand toward the door, when M. violently throttled him, and moved his hand as if endeavoring to draw a weapon, whereupon defendant, reaching out his hand toward a safe to steady himself, grasped a seal, and struck M. on the head, knocking him down, from which he died. In a civil action of damages, *held* that the defendant's act was justifiable. *Morgan v. Dufes* (Mo.), 508.

ASSUMPSIT.

See CONTRACT, 396.

ASYLUM.

For post.] *See* CONSTITUTIONAL LAW, 559.

ATTORNEY.

Provision for fee of, in note.] *See* NEGOTIABLE INSTRUMENTS, 856.

BAILMENT.

1. **Lien of bailee — waived by delivery of property.]** One who has acquired a lien for repairs on personal property conclusively waives it by voluntary and unconditional delivery of the property to the owner. *Sensenbrenner v. Matthews* (Wis.), 809.
2. **Or sale — storage of grain.]** A and B delivered grain to defendant at his elevator, and received from him a memorandum that it was "bought, at owner's risk as to fire," but specifying no price. The grain was placed by itself in a separate bin. Subsequently the defendant made an offer for it which A and B refused. Still subsequently the elevator and grain were destroyed by fire without defendant's fault. It was the custom to receive grain in this manner and afterward buy or return it. *Held*, that defendant was not liable for the loss. *Irons v. Kentner* (Iowa), 119.

BANKRUPTCY.

1. **Discharge — "fiduciary capacity."]** A discharge in bankruptcy bars an action for the conversion of securities pledged to the defendant as collateral to a loan, the cause of action not being a debt created by fraud, nor while acting in a fiduciary capacity, within the meaning of the Bankrupt Act. *Hennequin v. Clews* (N. Y.), 641.
2. **—.]** Where a sum of money is received by a factor and commission merchant, under a written stipulation of the factor that he received the money to be invested by him for the owner's account, the debt thus incurred by the factor is a fiduciary one, and under the United States Bankrupt Act of 1867, is not affected by the factor's discharge in bankruptcy. *Desobry v. Tête* (La.), 232.
3. **—.]** The balance due by a factor to his client, whether liquidated by the promissory note of the factor, or not, is not, in the hands of a transferee of the client, a fiduciary debt, and therefore is extinguished by the factor's discharge in bankruptcy. *Id.*

BAR.

See JUDGMENT, 570, 655.

BEQUEST.

See WILL, 418.

BILL OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS.

BILL OF LADING.

Rights of indorsee — unauthorized delivery of goods to another.] M., at Galveston, Texas, for account and by direction of H. at Philadelphia, purchased cotton and shipped it *via* New York. The money was advanced to M. by B., and M. purchased the cotton in his own name, and pursuant to agreement with B., made drafts on H. therefor payable to B.'s order, and attached the bills of lading. B. transmitted the drafts with the bills of lading to the plaintiff for collection, with instructions attached to "hold bill of lading until draft is paid." H. accepted the drafts on presentment. On arrival at Philadelphia, in accordance with a previous custom, the cotton was delivered by the carrier to H. without presentation of the bills of lading, and without the plaintiff's knowledge, and H. stored it with the defendant, and received from him an advance of \$10,000. H. thereafter failed. On learning of the delivery the plaintiff brought replevin. *Held*, maintainable. *Heiskell v. Farmers and Mechanics' National Bank* (Penn. St.), 745.

See CARRIER, 51.

BOND.

Official.] *See* SURETY, 60.*See* SURETY, 372.

BRIDGE.

Duty to repair.] *See* MUNICIPAL CORPORATION, 249.

CARRIER.

1. **Bill of lading — limitation of liability — evidence.]** The acceptance of a bill of lading restricting the carrier's liability, and the previous practice of accepting similar bills of lading, are some evidence, but not conclusive evidence, that the limitation was known and assented to by the shipper. *Erie and Western Transportation Company v. Dater* (Ill.), 51.
2. **Constitutional law — refusal to receive cattle for transportation — unconstitutional statute.]** A railroad company is not excused from receiving and transporting cattle by reason of a statute prohibiting such transportation, which is unconstitutional, although not so declared at the time of such refusal. *Chicago and Alton Railroad Co. v. Erickson* (Ill.), 70.
3. **Delivery at port — demurrage — detention by ice.]** A contract to deliver freight at a port implies at a wharf or other convenient or customary place of discharge, and where a master was unable to bring his vessel to any wharf for several days on account of ice, *held*, that he was not entitled to demurrage for such delay, although he notified the consignee, and although the consignee made a way through the ice for another vessel. *Hodgdon v. New Haven and Hartford Railroad Co.* (Conn.), 21.

CARRIER — Continued.

4. Ticket "good on passenger trains only."] A railway ticket marked, "good on passenger trains only," does not imply that all the passenger trains of the railroad company issuing it will stop at the station designated on it, nor impose on the company any obligation to stop there contrary to its rules. *Ohio and Mississippi Railway Company v. Swarthout* (Ind.), 104.

CERTIFICATION.

Of check.] *See* NEGOTIABLE INSTRUMENTS, 102.

CHARACTER.

See CRIMINAL LAW, 189.

CHATTEL MORTGAGE.

See MORTGAGE, 717.

CHECK.

See NEGOTIABLE INSTRUMENTS ; PAYMENT, 160.

COLLECTION.

Of tax.] *See* ESTOPPEL, 229.

Guaranty of.] *See* GUARANTY, 447.

COMPTROLLER OF CURRENCY.

Certificate of, as evidence to prove existence of National bank.] *See* NATIONAL BANK, 44.

CONSIDERATION.

See CONTRACT, 384.

CONSTITUTIONAL LAW.

1. Act to provide uniform text-books for public schools.] An act of the legislature providing that certain State officers shall contract on behalf of the State, with a designated individual, for furnishing the State for fifteen years with suitable text-books for the use of the public schools of the State, within specified maximum prices, of a certain size and quality and to be approved by a designated commission, is constitutional. *Curryer v. Merrill* (Minn.), 450.
2. Municipal license to sell produce.] A city ordinance prohibiting "every farmer, gardener or person producing vegetables" from selling the same in the streets without first procuring an annual license from the city authorities and paying \$25 therefor, is not warranted by a power "to establish public markets and other public buildings and make rules and regulations for the government of the same, to appoint suitable officers for overseeing and regulating such markets, and to restrain all persons

CONSTITUTIONAL LAW — *Continued.*

from interrupting or interfering with the due observance of such rules and regulations," and is void as to a farmer living outside the city and raising and selling his own produce. *City of St. Paul v. Traeger* (Minn.), 462.

3. **Nuisance — sounding steam whistle.]** The legislature may for the public good require what otherwise would be a public nuisance; and so a law requiring railway companies to sound a steam whistle on the approach of a locomotive to a public highway crossing is constitutional. *Pittsburgh, Cincinnati and St. Louis Railway Co. v. Brown* (Ind.), 73.
4. **Power of jury as to law in criminal case.]** Under the Pennsylvania Bill of Rights, the jury, in a criminal case, have the power, and consequently the right, to render a verdict contrary to the instructions of the court upon the law. *Kane v. Commonwealth* (Penn. St.), 787.
5. **Statute authorizing prisoner to elect to be tried by court.]** A statute providing that in criminal prosecutions the accused may elect to be tried by the court instead of a jury, and giving the court power in such cases to try the cases and render judgment, is constitutional, and such election will bind the accused." *State v. Worden* (Conn.), 27.
6. **Sale of estrays.]** A statute permitting the public sale by a public officer of animals found running at large in a public highway, and directing the payment of the proceeds, less the expense of sale and keeping, to the owner, with a certain time for redemption, is constitutional. *Campau v. Langley* (Mich.), 414.
7. **State poor asylum.]** Where the State Constitution declares that the counties shall respectively provide for their paupers, an act to establish and maintain a State asylum for the poor and maimed of the State is not warranted by a constitutional provision for "institutions for the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require." *State v. Hallock* (Nev.), 559.
8. **Sunday liquor law.]** A law authorizing the prohibition of the sale of intoxicating liquors on Sunday is constitutional. *State v. Bott* (La.), 224.
9. **"Vacancy" in office — erection of new county.]** Under a constitutional provision that the governor "may fill any vacancy that may happen * * * in any judicial or in any other elective office, which he is or may be authorized to fill; * * * but in any such case of vacancy in an elective office, a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election," a "vacancy" in the county offices "happens" when a new county is erected. *Walsh v. Commonwealth* (Penn. St.), 771.

See CARRIER, 70.

CONSTRUCTIVE FRAUD.

See FRAUD, 710, 781.

CONTRACT.

1. **Consideration — municipal corporation.]** An oral proposition by a citizen to a city council, that if the city would build one-half of a bridge across a certain river, he would build the other half, or if the city would build the whole he would pay for half, is binding on him if the city builds the bridge. *Long v. Battle Creek* (Mich.), 884.
2. **Entire — action on.]** Plaintiff agreed to furnish and erect on defendant's premises a gas generator "all ready to make gas," the defendant agreeing to pay freight, furnish tank and house, and pay \$1,500 for the machine. "\$500 when the works are on the ground," and the balance in two subsequent specified installments. The plaintiff shipped the materials, which the defendant received and paid the freight on, but the defendant refused to permit him to erect the machine. *Held*, that the contract was entire and indivisible, and an action for the contract price was not maintainable. *Butler v. Butler* (N. Y.), 648.
3. **Illegal — to divide fees of office.]** An agreement before an election to share the salary and fees of an office, in consideration of the plaintiff's using his influence to elect the defendant to such office, is void. *Gaston v. Drake* (Nev.), 548.
4. **Future delivery of stocks — margins.]** An agreement for future delivery of stocks, where there is no intention of delivering, but only of settling the difference between the agreed and the market price, is invalid, and "margins" cannot be recovered back, but the question of good faith is for the jury. *Gregory v. Wendell* (Mich.), 390.
5. **For labor — breach — recovery quantum meruit.]** Where one fails fully to perform a contract for labor, for any reason except voluntary abandonment, and the labor rendered is valuable, he may recover the value of the labor performed less any damages sustained by the other party for the breach. *Steeple v. Newton* (Or.), 705.
6. **Note — usury — negotiation in another State.]** Where a resident of this State makes a note here, dated, payable and intended to be discounted here, and specifying no rate of interest, and the note is first negotiated in another State, at a rate of interest lawful there but unlawful here, it is invalid for usury. *Dickinson v. Edwards* (N. Y.), 671.
7. **Place of — foreign corporation.]** A Canadian insurance company, having its home office at Montreal and a branch office at Baltimore, Maryland insured a resident of Washington, D. C., against loss by fire. In the printed heading of the policy were the words, "Baltimore Branch." The policy purported to be dated at Baltimore, to be signed by two directors of the company, by attorney, and to bear the seal of the company. The names of the directors were engraved, and were followed by the words, "by their attorney, J. A. R., manager Baltimore Branch," and "not valid unless countersigned by the duly authorized agent of this company at Washington, D. C.," (signed) "B. F. S., agent." J. A. R. was general manager for the Baltimore Branch office, and of the district of the Southern States and the District of Columbia. The company had an agency at

CONTRACT — *Continued.*

Washington, the agent there being appointed by J. A. R. subject to the right of rejection or removal by the company. B. F. S. was the agent of the company at Washington, and the policy was countersigned by him at Washington, and there delivered by him as the agent of the company to the insured. It was J. A. R.'s custom to sign policies as the general manager of the Baltimore Branch office, and send them in blank to the Washington and other local agents, who would fill them up, countersign and deliver them to the insured; and the policy in question was so signed by him as manager of the Baltimore Branch and sent in blank to the Washington agent. *Held*, that this was not a Maryland contract. *Cromwell v. Royal Canadian Insurance Company* (Md.), 258.

9. — *validity presumed.*] A note valid in Michigan is there presumed valid in Indiana; and if an Indiana woman pleads her disqualification to make a note given by her for goods purchased by her in Michigan, she must support it by proof of the Indiana law. *Wheeler v. Constantine* (Mich.), 855.

9. — *delivery to carrier.*] An oral order, in Michigan, to the agent of a Wisconsin firm, for liquors to an amount exceeding fifty dollars, subject to acceptance or rejection on arrival in Michigan, followed by delivery to a carrier in Wisconsin, does not constitute a binding contract under the Wisconsin statute of frauds, and is void under the Michigan prohibitory law. *Rindskopf v. De Ruyter* (Mich.), 840.

10. *Remedy for breach of specifications.*] One party to a building contract cannot be compelled to accept work not performed according to the specifications, and to rely on recoupment for his indemnity. *Martus v. Houck* (Mich.), 409.

11. *To "satisfaction."*] A contract for a portrait to be "satisfactory" to the customer gives him the option of refusing it at his pleasure. *Gibson v. Cranage* (Mich.), 851.

12. *Successive deliveries — breach — remedy — set-off.*] A contract to deliver 50,000 tons of coal in a year, at the rate of 6,000 tons a month, at the buyer's option, upon monthly notice of the quantity required for the next month, is severable; and where the contract has been partly performed, and the portion delivered has been paid for and consumed, but a portion of the coal so delivered and consumed was of inferior quality to that demanded by the contract, no right to rescind the contract is raised, but in an action by the vendor for a breach of the contract the defendant may set off his damages by reason of such substitution. *Scott v. Kuttanning Coal Co.* (Penn. St.), 753.

13. *Unconscionable — when not enforced.*] A woman and her husband, in consideration of the satisfaction of a demand of \$600 against the husband, and the payment to them of \$275, absolutely assigned to A and B a policy in favor of the defendant on her husband's life; A paid the subsequent premiums until maturity, when the amount due was \$1,477.73; the in-

CONTRACT — *Continued.*

urers refused to pay it without the defendant's receipt on the back of the policy ; the defendant refused to sign her name without receiving \$477.78 when the policy was collected ; accordingly A executed a written agreement to pay her that sum on the payment of the policy ; she signed her name, and A and B received the full amount ; in an action against them on the agreement, *held*, that it was unconscionable, and not enforceable beyond an amount fairly due for her service and inconvenience in writing her name. *Kelley v. Caplice* (Kans.), 179.

14. **Waiver of defective performance by payment.]** Payment in full, without objection, of the contract price of a building, with knowledge on the part of the owner that the work is defective, does not estop him from recovering damages for such defect ; but if the defect is slight and the owner is satisfied with the work, he may be found to have waived the defect. *Flannery v. Rohrmayer* (Conn.), 86.

15. **When not implied.]** Assumpsit cannot be based on a spontaneous and unasked service, rendered through kindness or to be more probably accounted for than by the expectation of payment, nor on a statutory obligation. *Woods v. Ayres* (Mich.), 396.

Want of privity.] *See* NEGLIGENCE, 1.

CONTRACTOR.

Injury to employee of.] *See* MASTER AND SERVANT, 428.

See NEGLIGENCE, 98.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATION.

Right of director to recover for services.] A president or director of a corporation, rendering services to the corporation outside the scope of his official duty and not required thereby, may recover compensation therefor upon a promise implied from facts and circumstances. *Santa Clara Mining Association v. Meredith* (Md.), 264.

Foreign.] *See* CONTRACT, 258.

See TAXATION, 688, 692.

COSTS.

See ACCORD AND SATISFACTION, 24.

COUNTY TREASURER.

See OFFICE AND OFFICER, 114.

COVENANT.

See LANDLORD AND TENANT, 480.

CRIMINAL LAW.

1. **Compelling prisoner to expose his person for identification.]** In a criminal case on a question of personal identity, a witness testified that the defendant had certain tattoo marks on his person. The court compelled the defendant, against his objection, to exhibit his person to the jury. *Held*, no error. *State v. Ah Chuey* (Nev.), 530.
2. **Consent to less than twelve jurors.]** On an indictment for forgery, the prisoner is bound by his consent to be tried by less than twelve jurors. *State v. Kaufman* (Iowa), 148.
3. **Embezzlement—town treasurer.]** It is embezzlement for a town treasurer to appropriate trust funds to private purposes and refuse to account for them, although he is not bound by law to pay over the identical money received. *People v. Bringard* (Mich.), 344.
4. **Evidence—proof of incorporation.]** On a criminal trial the existence of a corporation may be proved by general reputation. *State v. Thompson* (Kans.), 165.
5. **—previous good character.]** It is error to charge that previous good character is not a defense “as against facts positively or strongly proven and clearly indicating guilt.” *State v. Lindley* (Iowa), 139.
6. **Escape—unhealthful jail.]** It is no defense to an indictment for escape, that the jail was unhealthful and filthy. *State v. Davis* (Nev.), 563.
7. **False pretenses—representation of power to arrest.]** One who falsely represents himself to another as an officer having a warrant for the arrest of the other for forgery, and power to compromise the offense, and threatens to arrest him, and by means of such representation and threats obtains from him a valuable thing as a consideration for not making the arrest, is guilty of the crime of false pretenses. *Perkins v. State* (Ind.), 89.
8. **—when not larceny.]** Defendant, by false representations and with a design to cheat the complainant out of goods, induced him to ship goods to him, with the *indicia* of ownership, on the agreement that the defendant was to advance the freight, sell the goods, and account for the proceeds less the freight. The defendant sold the goods and converted the proceeds. *Held*, not larceny, but false pretenses. *Zink v. People* (N. Y.), 589.
9. **Homicide—justification.]** Homicide is not justified by the defendant's belief that the deceased had administered drugs to the defendant's sister in the unaccomplished endeavor to effect her seduction. *People v. Cook* (Mich.), 380.
10. **Larceny—lost property.]** If one finds lost property, and knows the owner, or there are marks on the property by which he can ascertain the owner, and he converts the property to his own use, intending at the time of finding so to convert it, he is guilty of larceny, but not so if that intention is not formed until afterward. *State v. Clifford* (Nev.), 526.
11. **—of change of bill.]** A offered a \$5 bill to pay 40 cents ferriage,

CRIMINAL LAW — *Continued.*

- received and kept the \$4.60 in change, but refused to deliver the \$5 bill. *Held*, larceny. *State v. Anderson* (Minn.), 455.
12. Indictment for unlawful sale of liquor — allegation of quantity.] A statute prohibited the sale of intoxicating liquors to minors in quantities less than a quart. An indictment alleged the sale of "one gill." *Held*, bad. *Arbintrode v. State* (Ind.), 86.
13. Selling liquor to minor — intent.] On a prosecution for selling intoxicating liquor to a minor, it is a good defense to show that the seller reasonably believed him of age. *Faulks v. People* (Mich.), 374.
14. Jury furnished with intoxicating drink.] A conviction in case of homicide will not be set aside on proof that the jury drank intoxicating liquors while consulting on their verdict, unless it appears that intoxication or other improper conduct was the result. *State v. West* (Mo.), 506.
15. Reasonable doubt — "common sense."] In a criminal case, it is error to charge that reasonable doubt of guilt means doubt suggested by or arising out of the proof made, and that in considering the evidence and arriving at a verdict, "what is called common sense is perhaps the juror's best guide." *Densmore v. State* (Ind.), 96.
16. Sunday, feeding hogs on.] The question of desecration of Sunday by criminal labor is one of fact. It is not unlawful, in the fall, before corn is ripe, to haul corn to feed hogs in the field and to feed them there on Sunday, it being the ordinary practice of good husbandmen to gather the feed daily in the field. *Edgerton v. State* (Ind.), 110.
17. Trial — jury consulting atlas.] Where an officer in charge of a jury, in a case of burglary, by their request but without authority of the court, furnishes them with an atlas, which they examine in their deliberations, their verdict of conviction is void, it not affirmatively appearing that no improper influence was thus produced on the jury. *State v. Lantz* (Kans.), 215.

Crime by wife with husband.] *See* SLANDER, 277.

Election to be tried by court.] *See* CONSTITUTIONAL LAW, 27.

CURTESY.

Tenancy by.] *See* FRAUD, 710.

CUSTOM.

See WAREHOUSEMAN, 293.

DAMAGES.

1. For assault.] In a civil action for damages by assault, evidence of the defendant's wealth is improper, unless it is a case for exemplary damages. *Morgan v. Durfee* (Mo.), 508.
2. Measure of, in action for mining coal.] In an action of damages for mining

DAMAGES — *Continued.*

and carrying away coal, the measure of damages is the value of the coal when first severed from the bed, allowing nothing for the expense of digging; and if the trespass was not unintentional, exemplary damages may be added. *Franklin Coal Co. v. McMillan* (Md.), 280.

2. — In trover for coal dug and carried away from the land of another, the measure of damages is the value of the coal at the mouth of the pit or shaft, less the cost of carriage from the bed thither, but allowing nothing for digging, separating, breaking or other acts necessary to render it marketable. *McLean County Coal Company v. Lennon* (Ill.), 64.
4. — for occupancy of street by railway, to lot-owner.] Although a railroad company is licensed to occupy a street or alley with its track, yet if in so doing it changes the grades, or otherwise obstructs access to lots by its tracks, or by leaving cars unnecessarily standing on the track, the lot-owner may maintain an action for damages, and the measure of damages where the obstruction is fluctuating, as by leaving cars on the track, is the injury prior to the commencement of the suit, but where the injury is permanent, as by the change of grade or the manner of laying the track, the lot-owner may recover the consequent depreciation in the value of his lot; and in such cases a recovery implies a conclusive consent to such occupation. *Central Branch Union Pacific Railroad Co. v. Twine* (Kans.), 203.
5. — in action for neglect to present draft.] See NEGOTIABLE INSTRUMENTS, 618.

DEED.

1. Action to reform — fraudulent insertion.] Defendant A contracted to convey to defendant B certain premises subject to certain mortgages. B assigned the contract to plaintiff. Without the consent or knowledge of B or the plaintiff, A inserted in the deed a clause binding plaintiff, to assume the payment of the mortgages. The plaintiff, supposing the deed conformed to the agreement, accepted it and put it on record. *Held*, that plaintiff could maintain an action to reform the deed by striking out that clause. *Kilmer v. Smith* (N. Y.), 618.
 2. Marriage — tenancy by entirety.] The rule that a conveyance to husband and wife constitutes them tenants by the entirety, the survivor taking the whole estate, is not changed by the abolition of joint tenancies, nor by the acts enabling married women to acquire and hold property separate from their husbands. *Marburg v. Cole* (Md.), 266.
 3. Reservation — "process of forcing water" — wind-mill.] Under a reservation in a deed of the right to "a supply of spring water by means of a hydraulic ram, wheel, or other process, of forcing water," the party entitled may substitute a wind-mill for a wheel previously used. *Richardson v. Clements* (Penn. St.), 784.
- 'Process of forcing water.')] See DEED, 784.

DEMURRAGE.

See CARRIER, 81.

DEVISE.

See WILL.

DIRECTOR.

Services of.] *See* CORPORATION, 264.

DISCHARGE.

See BANKRUPTCY, 641.

DISQUALIFICATION.

See JUDGE, 579.

DIVORCE.

See INSURANCE, 14; MARRIAGE.

EJECTMENT.

See MUNICIPAL CORPORATION, 867, 490.

ELECTION.

See MANDAMUS, 175.

EMBEZZLEMENT.

See CRIMINAL LAW, 844.

ENTIRETY.

Tenancy by.] *See* DEED, 266.

ESCAPE.

See CRIMINAL LAW, 568.

ESTOPPEL.

1. Compromise.] On a compromise between a principal maker of a note and part of his creditors, including a surety on the note, but not the holder, if the surety receives or agrees to receive and accept the compromise payment, he is estopped to deny his liability to the holder. *Irvine v. Adams* (Wis.), 817.

2. Of collector of tax to deny power of imposition.] The keeper or owner of a warehouse who has collected, on behalf of a municipal corporation, a tax levied by the corporation on goods consigned to him, is estopped from setting up a want of authority in the corporation to impose the tax. *Board of Trustees of New Iberia v. Serrett* (La.), 229.

See EXEMPTION, 152; INJUNCTION, 156.

ESTRAYS.

Sale of.] See CONSTITUTIONAL LAW, 414.

EVIDENCE.

1. Complaints of injured party on physical examination requested by opposite party — impeaching one's own witness.] In an action of damages for personal injuries by negligence, the plaintiff having at the defendant's request submitted to a physical examination by surgeons, *held*, (1) that testimony that judging from the examination, including what she said at the time, and her indications of suffering, the injury complained of existed, was admissible, although the witness swore he could discover no external evidence of it; (2) one of the surgeons, plaintiff's witness, having testified that from such examination he could not discover the injury complained of, was asked by plaintiff's counsel, under objection, whether it might not have existed without his being able to discover it, and answered that it was possible, but not probable; *held*, no error *Quaife v. Chicago and Northwestern Railway Company* (Wis.), 821.

2. Fraud — reputation of insolvency.] In support of a charge of fraud in inducing the plaintiff to accept worthless notes in payment for property, evidence that the maker was reputed insolvent where he and the defendant lived is competent *Conover v. Berdine* (Mo.), 496.

3. Note — presumption of settlement.] A note executed and delivered by one person to another is presumptive evidence of a settlement between them. *Mutasch v. Hughes* (Or.), 696.

Bill of lading.] See CARRIER, 51.

Judgment against principal.] See SURETY, 793.

Possession of unindorsed note.] See NEGOTIABLE INSTRUMENT, 685.

Of character.] See CRIMINAL LAW, 139.

Of custom.] See WAREHOUSEMAN, 293.

Of identification.] See CRIMINAL LAW, 530.

Of incorporation.] See CRIMINAL LAW, 165.

Of pecuniary standing of defendant.] See SLANDER, 375.

Of physician.] See STATUTORY CONSTRUCTION, 433.

See NATIONAL BANK, 44 ; NEGOTIABLE INSTRUMENT, 817.

EXECUTION.

See EXEMPTION, 498 ; RELIGIOUS SOCIETY, 683.

EXECUTORS AND ADMINISTRATORS.

Foreign executor — liability in another State.] A foreign executor, who, after proof of the will at the place of the testator's domicile in another State, comes into Connecticut to reside, bringing with him a portion of the estate, cannot be made liable in Connecticut, at the suit of a creditor of the testator, even to the extent of the property so removed. *Hedenberg v. Hedenberg* (Conn.), 10.

EXEMPTION.

1. **Homestead, when proceeds of sale of, not exempt.]** The proceeds of the sale of a homestead are not exempt from execution, unless the vendor has at the time of sale the intention of investing them in another homestead. *Smith v. Gore* (Kans.), 188.
2. **— leased land — partly used for business.]** A homestead may be acquired in a building erected on leased land, and although one or two rooms are used for business purposes. *Hogan v. Manners* (Kans.), 199.
3. **School-house.]** A public school-house is exempt from execution. *State v. Tiedemann* (Mo.), 498.
4. **Waiver — estoppel.]** One who sees his exempt property levied on and makes no objection, but being advised of his right, permits it to be taken, waives his right and is estopped from asserting it afterward. *Angell v. Johnson* (Iowa), 152.

EXTORTION.

See OFFICE AND OFFICER, 748.

FALSE PRETENSES.

See CRIMINAL LAW, 89, 589.

FISHERY.

Common of.] In the absence of notice against trespass, no action will lie for taking fish from a small lake nearly surrounded by the plaintiff's land. *Marsh v. Colby* (Mich.), 439.

FIXTURES.

Trade — landlord and tenant — renewal of lease from new landlord.] Erections made by a lessee on the leased property do not come within a subsequent mortgage of the premises, although the lessee neglects to remove them during the term and accepts a renewal of the lease from a new landlord. *Kerr v. Kingbury* (Mich.), 362.

FORGERY.

Action for money had and received by.] *See* ACTION, 682.

Disqualification of witness by conviction of, in another State.] *See* WITNESS, 682.

FORMER JUDGMENT.

See JUDGMENT, 590, 655.

FRAUD.

1. **Constructive — physician and patient.]** A. was seventy years old, very wealthy, infirm and confined to the house, but of sound mind and judgment. F. was his physician and confidential friend. A. executed a contract with F., by which, in consideration of one dollar and F.'s services in

FRAUD — *Continued.*

securing certain stock for A., A. agreed to transfer a certain interest in the stock to F. F. received thereby about \$50,000. A. having died, his executors brought suit to set aside the transaction. *Held*, that F. was at liberty to show that the transaction was a gift; that a physician is not prohibited from receiving a gift from his patient by reason of the mere relation; and that the burden of proof of fairness is not on the defendant. *Audenreid's Appeal* (Penn.), 731.

2. — deed between affianced parties — tenancy by curtesy.] A deed from a woman to her affianced husband, especially when she is pregnant by him, is presumptively void; but when such a deed is set aside after marriage, the husband's right to tenancy by curtesy reattaches. *Gilmore v. Burch* (Or.), 710.

3. Representation as to market price — when it does not avoid contract.] A false and fraudulent representation of the market price of wool, made by the vendor to induce a sale and relied on by the vendee, will not avoid the contract, where the vendor had no special facilities of ascertaining the market price and there were no special circumstances making it his duty to communicate his knowledge. *Graffenstein v. Epstein* (Kans.), 171.

Reputation of insolvency, as evidence of.] See EVIDENCE, 496.

GARNISHMENT.

1. Public school teachers' wages.] A school district cannot be garnished for teachers' wages, the statute prohibiting the garnishment of municipal corporations. *School District v. Gage* (Mich.), 431.

2. — holidays.] Teachers' wages are not subject to deductions for recognized holidays. *Id.*

GUARDIAN.

Testamentary, right of, to custody of child.] See MARRIAGE, 371.

GUARANTY.

Of collection — when enforceable.] A guaranty of collection cannot be enforced until legal proceedings to collect have been instituted and proved ineffectual, although the principal may have been insolvent. *Boeman v. Akeley* (Mich.), 447.

HIGHWAY.

Liability of lot-owner for defective condition of sidewalk — construction of statute.] A city charter required lot-owners to keep the sidewalk "in a good and safe condition for use," and made them liable for injuries to any person by "reason of a defective sidewalk." The sidewalk in front of defendants' premises had become smooth and slippery by long use, and some third person, with their knowledge, had painted it, thus increasing its slipperiness. The plaintiff slipped and fell on it, sustaining injury. *Held*, that defendants were liable. *Morton v. Smith* (Wis.), 811.

HOMESTEAD.

See EXEMPTION, 188, 199.

HOMICIDE.

See CRIMINAL LAW, 380.

HUSBAND AND WIFE.

See MARRIAGE ; USURY, 140.

ICE.

See CARRIER, 21.

INDICTMENT.

See CRIMINAL LAW, 86.

INDORSEMENT.

Before utterance.] *See* NEGOTIABLE INSTRUMENTS, 89.

See NEGOTIABLE INSTRUMENTS.

INFANCY.

Surety — when mortgage binding.] An infant gave his note with a surety, for the purchase-money of chattels. The vendor recovered judgment thereon, which the surety paid. The infant gave him his note therefor, secured by mortgage on the same chattels. That mortgage was held valid as against a purchaser of the chattels from the infant, with knowledge of the mortgage. *Knaggs v. Green* (Wis.), 838.

INJUNCTION.

Acquiescence — estoppel.] An injunction against the diversion and damming of water will not be granted where the complainant has delayed proceeding for two years after acquiring knowledge of the injury, and the dam meanwhile has been twice rebuilt, and the injunction would work great damage to the defendant. *Thomas v. Woodman* (Kans.), 156.

See NUISANCE, 325.

INSANITY.

Action against lunatic.] A lunatic may be sued at law and judgment may proceed against him upon a debt contracted while he was of sound mind, and equity will not interfere. *Stigers v. Brent* (Md.), 817.

INSURANCE.

FIRE.

1. Action to reform policy — limitation for bringing.] In an action to reform a policy of insurance, after loss, *held*, (1) an agreement to renew a policy of insurance is presumed to imply that no change is to be made in its terms. (2) Such action is not "for the recovery of any claim by virtue of

INSURANCE — *Continued.*

this policy," within the meaning of a provision that "no action for the recovery of any claim by virtue of this policy shall be sustainable" unless commenced within twelve months after the loss. (3) The limitation commences when the amount of the loss is due and payable, and not when the loss occurred. *Hay v. Star Fire Insurance Company* (N. Y.), 607.

2. **Limitation of time to bring suit for loss.]** Where a policy of fire insurance provides that no action shall be sustainable thereon until an award fixing the amount of the claim, nor unless commenced within twelve months next after the loss shall occur, the action must be brought within twelve months from the occurrence of the fire, and the time does not continue until twelve months after the award. *Johnson v. Humboldt Insurance Company* (Ill.), 47.
3. **Continuing warranty.]** On an application for fire insurance the applicant was asked "Is there a watchman in the mill during the night? Is the mill ever left alone?" The answer was, "no regular watchman, but one or two hands sleep in the mill." *Held*, under a warranty policy, a continuing warranty. *Blumer v. Phoenix Insurance Company* (Wis.), 830.
4. **On stock of goods — condition against keeping explosive fluids.]** A fire policy insured a stock of "general merchandise of all kinds usually kept in a country retail store," "except as hereinafter provided." Immediately following this was an exemption from liability for loss where "turpentine or benzine" were deposited, stored, kept, or used, without written consent on the policy. The insurance clause was written; the exempting clause was printed. The insured kept for sale both turpentine and benzine without such consent. *Held*, that the policy was void, although those articles might be part of the merchandise usually kept in such stores. *Lancaster Fire Insurance Company v. Lenheim* (Penn. State), 778.
5. **Wearing apparel in dwelling — destruction outside.]** A policy insured "household furniture, useful and ornamental, including sewing machine, provisions and family wearing apparel, all contained in" a certain dwelling-house. The insured sustained damage to his personal apparel, part of the insured, while wearing it away from the insured premises. *Held*, that the policy covered the loss. *Longueville v. Western Assurance Company* (Iowa), 146.

LIFE.

6. **Condition for payment of premiums — waiver.]** A policy of life insurance, assigned to plaintiff, provided that the defendant should be notified forthwith of the death of the insured, and that the owner should, as soon as possible thereafter, deliver to the defendant a particular account of the cause, time, place and circumstances, and that unless such proofs were presented within twelve months from the time the death occurred, the policy should be forfeited. After the assignment the plaintiff paid

INSURANCE—*Continued.*

the premiums by his checks. About July 1, 1872, the plaintiff, being about to go to Europe, paid in advance the premium due August 10. It was then agreed between him and the general agent that if the insured should die before the premium became due the company's agents would know of it before the plaintiff could, and that the premium should be returned, and that "there was no trouble at all in regard to that whole thing." The plaintiff returned in October, 1872. The insured died July 27, 1873, but his death was not known to either party until July, 1875. The plaintiff paid the premiums for 1873 and 1874, having received notice from the company of the time when they were to fall due, and receiving renewal receipts. In June or July, 1875, plaintiff learned of the death, notified the company, received blanks for proofs of death, and delivered the proofs to them July 9. The proof stated the death in July, 1873. The company retained the proofs until October next without objection, and then took the ground that the policy was forfeited by the omission to serve the proofs within twelve months of the death. The policy was payable in three months after proof of death. The company retained the premiums paid after the death, and never offered to return them until after the action. *Held*, that the forfeiture was waived. *Prentice v. Knickerbocker Life Insurance Company* (N. Y.), 651.

7. **Effect of divorce on ownership of policy issued to wife on husband's life.]** A husband procured the issue and delivery to his wife of a lawful policy on his life payable to her for her sole use, or in case of her death before his, to their children. Seven years later she procured a divorce from him. She always had the custody of the policy, but the husband paid all the premiums, except the last one before the divorce, which she paid. Afterward, without his knowledge, she surrendered the policy, and took a like paid-up policy. The husband died after her, and there were never any children. *Held*, that her representatives were entitled to the insurance. *Phœnix Mutual Life Insurance Company v. Dunham* (Conn.), 14.

INTENT.

See CRIMINAL LAW, 374.

JUDGMENT.

1. **Former—when a bar.]** An action by the owner of goods against a carrier, for damages for failure to transport such goods, is barred by a previous judgment in favor of the carrier against the owner for the freight of such goods. *Dunham v. Bower* (N. Y.), 570.
2. **— to action to reform insurance policy.]** The defendant, a New York corporation, insured the plaintiff at Baltimore, Maryland, against fire, on "his stock of fancy goods, toys, and other articles in his line of business, contained in his store occupied by him as a general jobber and importer." The policy contained a condition against storing or keeping hazardous, extra hazardous, or specially hazardous articles in

JUDGMENT — *Continued.*

the second class of hazards annexed to the policy, and that during the time of such storing or keeping the policy should be of no effect. "Fire-crackers in packages" were classed as hazardous No. 2 in the second class, and fire-works were classed as specially hazardous. There was a written permission "to keep fire-crackers on sale," but no express permission to keep fire-works. The plaintiff kept fire-works and the fire originated from them. The plaintiff sued to recover for the loss in a Baltimore court, the cause was removed to the United States court, and on the trial the court held that the policy prohibited keeping fire-works, and rejected proof to show that they constituted an article in the line of business of a "German jobber and importer," and gave judgment for defendant. This was affirmed by the United States Supreme Court. Before that action the plaintiff had sued the Lafayette Fire Insurance Company in the New York Supreme Court on a similar policy on the same stock and had recovered, and on appeal the evidence rejected in the United States court was held competent, and the appellate courts refused to be bound by the rule laid down in the United States Supreme Court. Plaintiff then brought this action to reform the policy by inserting permission to keep fire-works, on the ground that it was omitted by mistake, and to recover on the policy so reformed. *Held*, that the judgment of the United States Supreme Court is a bar to this action. *Steinbach v. Relief Fire Insurance Company* (N. Y.), 655.

JUDGE.

1. Disqualification — kinship to stockholder in corporate party.] Under a statute prohibiting a judge from sitting in a cause where he is related by consanguinity or affinity to either of the parties, a judge is not disqualified from sitting in a proceeding to which a corporation is a party, by his kinship to a stockholder of the corporation. *Matter of Dodge and Steenson Manufacturing Company* (N. Y.), 579.
2. Interest — probate judge named as legatee, to prove will.] A probate judge named as legatee may lawfully make the orders of hearing and notice for proof of the will, the statute incapacitating him only from acting in the decision of the question. *McFarlane v. Clark* (Mich.), 846.

JURISDICTION.

See JUDGE, 846.

JURY.

- Consent to less than 12.] *See* CRIMINAL LAW, 148.
- Dispensing with, in criminal case.] *See* CONSTITUTIONAL LAW, 27.
- Furnished with intoxicating drink.] *See* CRIMINAL LAW, 506.
- Power as to law in criminal case.] *See* CONSTITUTIONAL LAW, 787.
- See* CRIMINAL LAW, 215.

JUSTIFICATION.

Of homicide.] *See* CRIMINAL LAW, 380.

LACHES.

See PAYMENT, 169 ; SURETY, 60.

LANDLORD AND TENANT.

Covenant to rebuild — discharge of.] A lessee of wooden building, covenanting to rebuild in case of fire, is released by the enactment of a valid ordinance prohibiting the erection of wooden buildings. *Cordes v. Miller* (Mich.), 480.

See FIXTURES, 363.

LARCENY.

See CRIMINAL LAW, 455, 526, 589.

LICENSE.

Municipal.] *See* CONSTITUTIONAL LAW, 462.

LIEN.

See BAILMENT, 809.

LIMITATION.

Of suit on insurance policy.] *See* INSURANCE, 47, 607.

LOST PROPERTY.

See CRIMINAL LAW, 526.

LUNATIC.

See INFANCY, 317.

MANDAMUS.

To canvassing board — election clearly fraudulent.] A mandamus will not issue to compel a canvassing board to canvass election returns and declare the result, where the returns to the board show that there were 2,947 votes cast, and there were in fact only 800 legal voters in the county. *State ex rel. Mitchell v. Stevens* (Kans.), 175.

See RELIGIOUS SOCIETY, 217.

MARRIAGE.

1. Conveyance by husband to wife.] A voluntary deed from husband to wife is valid as against the husband's adult heir, not dependent on him for support. *Horder v. Horder* (Kans.), 167.

2. Divorce — annulling decree, effect of.] The annulling of a decree of divorce replaces the parties in the state in which they were before the divorce, without regard to a subsequent marriage and the birth of children;

MARRIAGE — *Continued.*

an agreement between the parties to the contrary is of no effect; and where the divorce was granted by the court of another State, it will be presumed that the annulling of the decree by the same court is regular and valid. *Comstock v. Adams* (Kans.), 191.

3. — alimony — husband not liable beyond.] Where alimony in a wife's suit for divorce has been fixed by the court and duly paid by the husband, the husband is not liable for subsequently furnished necessities. *Crittenden v. Schermerhorn* (Mich.), 440.
4. — custody of child — testamentary guardian — access.] A decree of divorce gave the custody of the infant child of the parties to the father, subject to the mother's right of access in a specified manner. *Held*, that the father might appoint a testamentary guardian, but this could not cut off the mother's right of access, to be regulated by the court. *Hill v. Hill* (Md.), 271.
5. — liability of father for support of child awarded to mother.] Where a decree of divorce awards the custody of a minor child to the mother, the father is not further bound for the support and maintenance of the child. *Husband v. Husband* (Ind.), 107.
6. Married woman's liability on indorsement for corporation debt.] A married woman is not liable on her indorsement of a note transferred by her to secure the debt of a corporation in which she is a stockholder. *Russell v. People's Savings Bank* (Mich.), 444.

Building on wife's land at husband's request.] *See* MECHANICS' LIEN, 86.

Married woman's liability for money had and received by forgery.] *See* ACTION, 632.

MARRIED WOMAN.

See MARRIAGE.

MASTER AND SERVANT.

1. Negligence — duty of master in respect to machinery.] A railway engineer was killed by the explosion of a locomotive boiler. The boiler was made of the best material, and by first-class manufacturers; it had not been used long enough to create a reasonable suspicion of its unsafe condition; the defect could not have been discovered by any of the usual tests, and its appearance did not indicate its unsafe condition. *Held*, that the company was not answerable, being bound only to provide machinery of good material, constructed in a workmanlike manner. *Indianapolis, Bloomington & Western Railway Co. v. Toy* (Ill.), 57.
2. — duty as to appliances — rails of railway — contributory negligence.] A brakeman in the service of a railway company was injured by catching his foot in the guard of a switch. The guard was of T rail, the kind in general use, and it appeared that U rail would have been safer, although not in general use. The brakeman knew the character of

MASTER AND SERVANT — *Continued.*

the rail, and continued in the service without objection. *Held*, that the railway company was not responsible in damages. *Smith v. St. Louis, Kansas City and Northern Railway Company* (Mo.), 484.

3. — telegraph pole near railway — contributory negligence.] A brakeman in defendant's employ, descending the ladder of a moving freight car, to throw a switch, was struck by a telegraph pole standing only eighteen inches from the car and killed. The pole had been suffered to remain in that position three years, but there was no evidence that defendant put it there or knew of its existence. There was no evidence that the brakeman knew of it. *Held*, that an action of damages for the killing was maintainable. *Chicago and Iowa Railroad Company v. Russell* (Ill.), 54.
4. — injury to contractor's employee.] Where a mining company contracts for the removal of ore, but assumes the duty of making arrangements to protect the workmen, it is liable to the contractor's employees for injury in consequence of neglect of that duty. *Lake Superior Iron Co. v. Erickson* (Mich.), 423.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANICS' LIEN.

1. Building on wife's land at husband's request.] Where a building is erected on a wife's land at the sole request of her husband, a mechanics' lien will not attach to the wife's estate in the land, although she knew of and did not object to the erection while it was in progress. *Flannery v. Rohrmayer* (Conn.), 86.
2. On public school-house.] A mechanics' lien will not attach to a public school-house. *Charnock v. District Township of Colfax* (Iowa), 116.
3. Writing not necessary.] A contract, to afford a foundation for a mechanics' lien, need not be in writing, the statute not requiring it. *Neilson v. Iowa Eastern Railroad Co.* (Iowa), 124.
4. Railroad rolling stock.] A mechanics' lien does not attach to railroad rolling stock. *Id.*
5. Materials not used.] A mechanics' lien attaches for materials furnished according to contract whether they are used or not. *Id.*
6. Waived by taking mortgage.] A mechanics' lien on real property is waived by the lienor's acceptance of a mortgage on such property for the amount due on such lien. *Trullinger v. Kofoed* (Or.), 708.

MISTAKE.

- Law and fact — relief in equity.]** An administrator sold lands of his intestate to B, both supposing the fee was conveyed, whereas only an equity of redemption passed. *Held*, that equity would relieve the purchaser. *Griffith v. Townley* (Mo.), 476.

MORTGAGE.

Chattel — when void as to creditors.] A mortgage of chattels is void as to creditors when it appears upon the face of it, or by extrinsic evidence, that the mortgagee gave the mortgagor unlimited power to dispose of the mortgaged property for his own use. *Orton v. Orton* (Or.), 717.

MUNICIPAL CORPORATION.

- 1. Defective bridge — duty of another to repair.]** In consideration of a permission to cut a public highway with their canal, the duty of bridging the canal and keeping the bridge in repair was by law devolved upon the canal company. The duty of keeping public bridges in repair was by law primarily devolved on the county commissioners. The plaintiff was injured by a defect in the bridge. *Held*, that the county commissioners were liable to him therefor. *Eyler v. County Commissioners of Allegany County* (Md.), 249.
- 2. Ejectment against, for street.]** Ejectment lies against a municipal corporation for land wrongfully taken for a street. *Armstrong v. City of St. Louis* (Mo.), 499.
- 3. — to remove obstructions from street.]** A county cannot maintain ejectment to remove obstructions from land dedicated as a street, but held adversely. *Bay County v. Bradley* (Mich.), 367.
- 4. Liability for delay in executing ordinance for condemnation of land.]** Where a municipal corporation has resolved to condemn land for public use, and culpably or unreasonably delays the prosecution of the work, or abandons it, to the damage of the land-owner, he is entitled to indemnity, whether the delay occurred before or after the completion of the assessment of damages and benefits; but if he acquiesce in the delay, and fails to require the city to go on with the work or repeal the ordinance, he is remediless. *Black v. Mayor, etc., of Baltimore* (Md.), 320.
- 5. — for injury by surface water.]** If a municipal corporation, in improving its streets, accumulates surface water and turns it in new and destructive currents upon the lands of adjoining owners, it is liable in damages. *O'Brien v. City of St. Paul* (Minn.), 470.
- 6. —]** A municipal corporation, intrusted with the care of streets, in discharging that duty, and without negligence, increased the natural flow of surface water discharging into a certain mill-race, whereby the mill-owners sustained injury. *Held*, that no action was maintainable therefor. *Mayor, etc., of Cumberland v. Willison* (Md.), 304.
- 7. — for tort of its officer.]** A city is not liable in an action of damages where its treasurer, upon a tax warrant, sold the plaintiff's goods by mistake for those of another. *Wallace v. City of Menasha* (Wis.), 804.
- 8. — for wrongful act of police.]** A city is not liable for the wrongful act of its police in the enforcement of police regulations, and cannot become liable by ratification. *Calwell v. City of Boone* (Iowa), 154.
- 9. Negligence — duty as to nuisance — dangerous building.]** A ruinous wall

MUNICIPAL CORPORATION -- *Continued.*

on private property in a city, dangerously near a public street, fell and killed a child in a building one foot outside the limits of the street. The city authorities knew of the condition of the wall, were authorized by the charter to declare and abate nuisances, and there was a city ordinance declaring dangerous buildings and structures nuisances. *Held*, that the city was liable in damages for the death. *Kiley v. City of Kansas* (Mo.), 491.

10. **Not liable for damages by cyclone.]** A municipal corporation is not liable for injuries caused by the fall of a public market building, caused by a cyclone. *Flori v. City of St. Louis* (Mo.), 504.
11. **Nuisance -- stationary steam engine in city -- power of authorities to remove.]** A stationary steam engine in a city is not in itself a nuisance; and an ordinance prohibiting any person from putting one up without the consent of the mayor and common council, and allowing the revocation of such permits and compelling the removal of such engines, on six months' notice, under a prescribed penalty, is unreasonable and void, although the charter authorizes ordinances for the prevention and extinguishment of fire, for the security of persons and property, and for the promotion of the interests and good government of the city. *Mayor, etc., of Baltimore v. Radecke* (Md.), 289.

See CONTRACT, 384; NEGLIGENCE, 574.

NATIONAL BANK.

1. **Evidence of existence -- certificate of comptroller of currency.]** In an action by a National bank on a note, where the existence of the corporation is denied, the certificate of the comptroller of the currency, under section 22 of the National Banking Act, that the association had complied with the law and was authorized to do banking business, is competent evidence, and in connection with proof that the association had done banking business for several years, and the fact that the note was in terms payable at the bank, makes a *prima facie* case. *Mix v. National Bank of Bloomington* (Ill.), 44.
2. **Insolvent -- set-off as against receiver.]** The receiver of an insolvent National bank sued A and B on their joint note given to the bank. They claimed to set off notes given by the bank, and C and D who were also insolvent, as joint makers, to D alone, and maturing after the receiver's appointment, and growing out of a distinct transaction from the note in suit. *Held*, not a proper set-off. *Balch v. Wilson* (Minn.), 467.
3. **Liability for special deposits.]** A National bank, receiving a special deposit for safe-keeping without reward, is liable only for gross negligence; the burden of proof is on the plaintiff; and gross negligence is not the omission of that care which every attentive and diligent person takes of his own goods, but the omission of that care which the most inattentive takes. *First National Bank of Allentown v. Rex* (Penn. St.), 767.

NATIONAL BANK — *Continued.*

4. —.] *It seems*, when the president of a bank, for his own private purposes, hypothecates bonds especially deposited with the bank for gratuitous safe-keeping, and they are thereby lost, the bank is not liable, unless the bank officers knew, and assented, or used no effort to recover them. *Id.*
5. Power to act as broker in purchase of securities.] A National bank has no inherent power to act as an agent in the purchase of bonds or stocks for third persons, and its president cannot bind it by an agreement so to act, without special authority. *First National Bank of Allentown v. Hoch* (Penn. St.), 769.

NAVIGATION LAWS.

See SHIPS AND SHIPPING, 721.

NEGLIGENCE.

1. Contractor — ruinous building under repair.] The owner of a house which had been burned suffered the walls to stand in an unsafe and tottering condition for three weeks, meantime removing the rubbish. He then contracted for the rebuilding of the house. About seven or eight weeks after the fire, and while the premises were in the charge and possession of the contractor, one of the walls fell on the buildings of an adjoining owner. *Held*, that the owner of the ruinous premises was liable for the damage. *Sessengut v. Posey* (Ind.), 98.
2. Contributory — concurring causes.] The plaintiff was driving a blind horse and a wagon on one of defendant's streets; the horse becoming frightened, ran away, and was turned by a heap of ashes, negligently suffered in the street, into the gutter, where the wagon struck against the nozzle of a city hydrant projecting four inches over the gutter, and was overturned, and the plaintiff was injured. *Held*, (1) that the running away of the horse would not prevent a recovery; (2) that in the absence of evidence that the hydrant was improperly placed, negligence could not be presumed from its position and construction; (3) that in the absence of a finding that the accident was caused by the heap of ashes no recovery could be based on the negligence in suffering it to accumulate in the street. *Ring v. City of Cohoes* (N. Y.), 574.
3. County bridge — notice of defect.] In an action against a county for damages resulting from a defective bridge, actual or implied notice to the county of the defective condition of the bridge must be shown. *Heilner v. Union County* (Or.), 703.
4. Ordinance — evidence.] A municipal ordinance required owners of wharves to maintain cap-logs. Owing to the absence of a cap-log on the defendant's wharf the plaintiff, acquainted with the premises, sustained injury. Evidence was offered by the defendant to show that cap-logs would have interfered with the loading of vessels in the course of their business. This was rejected. *Held* error. Also *held*, that no liability was raised by

NEGLIGENCE — *Continued.*

the mere non-compliance with the ordinance. *Philadelphia and Reading Railroad Co. v. Ervin* (Penn.), 726.

5. **Railroad — trespasser.]** A boy, four or five years old, unaccompanied, climbed upon a railroad car, standing alone on a switch-track on a slightly descending grade, with brakes fastened, unfastened the brakes, and thus started the car, and then jumping or falling off, was run over by the car and killed; *held* that there was no liability on the part of the railway company. *Central Branch, etc., Railroad Co. v. Henigh* (Kans.), 167.
5. **Removal of snow by street railway company.]** A street railway company having a franchise to operate its road on a city street, has a right to remove the snow from its track and place it upon another part of the street, and if it exercises ordinary care and prudence in doing these acts it will not be held liable for injury done to adjoining property by reason of such snow obstructing the flow of water in the street. *Short v. Baltimore City Passenger Railway Co.* (Md.), 298.
7. **Want of privity of contract.]** A company, organized to supply the inhabitants of a city with water, contracted with the municipal authorities to supply their hydrants, but failing to do so, the fire department were unable to extinguish a fire in the city. *Held*, that the company were not liable in damages to the owner of the property destroyed. *Nickerson v. Bridgeport Hydraulic Company* (Conn.), 1.

Death by, on high seas.] *See* ACTION, 664.

For damage by cyclone.] *See* MUNICIPAL CORPORATION, 504.

In leaving blank.] *See* NEGOTIABLE INSTRUMENTS, 129.

See MASTER AND SERVANT, 54, 484; WAREHOUSEMAN, 298.

NEGOTIABLE INSTRUMENTS.

1. **Alteration — negligence in leaving blank.]** A negotiable note for ten dollars was executed with a blank preceding the amount. Afterward the words "one hundred and" were fraudulently inserted before the word "ten." There was nothing in the note to excite suspicion, and it was subsequently transferred to an innocent person. *Held*, that he could not recover. *Knoxville National Bank v. Clarke* (Iowa), 129.
2. **— restoration.]** A note was executed specifying no rate of interest. Afterward, without the maker's knowledge, the words "ten per cent interest from date" were inserted, by the payer's consent, immediately after the word "at," in a blank left for the insertion of the place of payment. Subsequently the added words were erased, and the erasure was visible. *Held*, that an innocent purchaser for value could recover on the note. *Snepard v. Whetstone* (Iowa), 143.
3. **— addition of "annually" to interest clause.]** The addition of the word "annually" to the interest clause of a note payable in less than two years, is not a material alteration, as it does not require the payment of interest at the end of the year. *Leonard v. Phillips* (Mich.), 370.

NEGOTIABLE INSTRUMENTS — *Continued.*

4. **Attorney's fee, provision for.]** A provision in a note for an attorney's fee in case of proceedings to collect is void. *Bullock v. Taylor* (Mich.), 856.
5. **Bill of exchange — order — oral acceptance — defense of no funds.]** An order by A on B to pay to C and charge to A is a bill of exchange; may be accepted orally; and the acceptor cannot defend by reason of want of funds of the drawer in his hands. *Jarvis v. Wilson* (Conn.), 18.
6. **Evidence — possession of unindorsed note.]** Possession of an unindorsed note, payable to a particular person, by another than the payee, is presumptive evidence of ownership, and he may recover, although a statute requires every action to be prosecuted in the name of the real party in interest. *Jackson v. Love* (N. C.), 685.
7. **—.]** An apparent principal maker of a promissory note may show by parol that the holder knew, at the time of its execution, that he was a mere surety. *Irvine v. Adams* (Wis.), 817.
8. **Surety.]** An apparent principal maker of a note, known by the holder at the time of execution to be a mere surety, will not be discharged by successive usurious agreements, between the payee and principal maker of a note, for extension of the time of payment, followed by payment of the usurious consideration after the expiration of such extended time, there being no suspension of the payee's right to enforce payment. *Id.*
9. **Indorsement before utterance.]** A, for accommodation, indorsed in blank a note payable to the order of B, who subsequently indorsed it above him, and it was transferred by a subsequent holder before maturity to the plaintiff, a purchaser in good faith, and without notice. *Held*, that A, having been duly notified of protest, could not show, as against the holder, that his indorsement was not regular. *Thacher v. Stevens* (Conn.), 89.
10. **Negligence of agent in presentation — damages.]** On the 22d of March, 1866, the National Bank of Crawford county, Pennsylvania, made and delivered to plaintiff a sight draft upon Culver, Penn & Co., of New York city. The plaintiff indorsed it and sent it by mail to defendant, its corresponding bank in that city, for collection and credit. Defendant received it on the morning of March 26, presented it on the same day, received the drawee's check upon the Third National Bank of New York, and delivered up the draft. The check was not presented for payment until the next day, and then through the clearing-house. The drawees failed on the latter day, and the bank refused to pay the check. The defendant on the same day returned it and received back the draft, formally demanded payment of the draft, protested it for non-payment, and the next day mailed notice thereof to plaintiff and the drawer. The drawee's account was largely overdrawn on the 26th, but the bank had been in the habit of allowing such overdrafts for a month, the drawees making their account good on the next day, and the bank paid all their checks drawn that day, and some drawn later than the one in

NEGOTIABLE INSTRUMENTS — *Continued.*

question, and continued to do so down to the failure on the next day. In an action of damages for negligence against defendant, a recovery was allowed for the amount of the draft with interest. *Held*, (1) that defendant was negligent and liable for the consequent damages; (2) that the facts did not justify the finding that the draft would not have been paid if duly presented; (3) but that the measure of damages was the actual loss, and evidence was admissible to reduce it to a nominal sum. *First National Bank of Meadville v. Fourth National Bank of the City of New York* (N. Y.), 618.

11. Note transferred for pre-existing debt.] One who takes a promissory note before maturity in good faith in payment of or as security for an antecedent debt, holds it for a valuable consideration and free from equities. *Mix v. National Bank of Bloomington* (Ill.), 44.
12. Payment of promissory note — when no discharge.] The payee of a note indorsed and delivered it, before maturity, to a bank, as collateral security for a demand of the plaintiff; subsequently, but before maturity, the maker paid it to the payee, not knowing of the transfer, and took a receipt; *held*, that the note was not thereby discharged. *Best v. Crall* (Kans.), 185.
13. Raised check — certification.] B presented a check to the bank on which it was drawn, after banking hours, and the cashier told him they would pay it during banking hours. Relying on this, B advanced the amount to the payee and took the check. The bank paid the check the next day. Subsequently discovering that it had been fraudulently raised, the bank sued B to recover the amount so paid. *Held*, that they were entitled to recover, although B was ignorant of the forgery. *Parks v. Roser* (Ind.), 102.
14. Surety as apparent principal — liability to pay when time extended.] One who executes a note, apparently as principal but really as surety, cannot avoid liability to the payee, who was ignorant of the true relation, by reason of the agreement of the surety with the principal for extension of the time of payment. *McCloskey v. Indianapolis Manufacturers and Carpenters' Union* (Ind.), 76.
15. Waiver of protest.] A waiver of protest by the indorsers of a promissory note includes a waiver of demand. *Harvey v. Nelson* (La.), 222.

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— construction of bequests, 420.

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NOTICE.

See NEGLIGENCE, 703.

NUISANCE.

1. **By several, liability of each.]** In an action of nuisance against several acting independently in polluting a stream by the discharge of sewerage from the premises of each, each is liable only to the extent of the separate injury committed by him. *Chipman v. Palmer* (N. Y.), 566.

2. **Injunction — steam engine.]** An injunction will issue to restrain the opera-

NUISANCE — *Continued.*

tion of steam machinery which jars and shakes the complainant's house so as to render it unsafe or unfit for habitation. *Dittman v. Repp* (Md.), 325.

See CONSTITUTIONAL LAW, 73 ; MUNICIPAL CORPORATIONS, 239, 491.

OFFICE AND OFFICER.

1. **Action against recorder for imperfect search — privity.]** L. applied to plaintiff for a loan of money to be secured by real estate mortgage. Searches of title were ordered from the defendant, the county recorder, by L., with the consent of the plaintiff's attorney. At the request of L. the defendant omitted stating certain mortgage incumbrances in his searches, on L.'s promise to have them satisfied. The plaintiff loaned the money on the faith of the searches, and the property having been foreclosed and sold under the omitted mortgages, whereby the plaintiff lost its money, *held*, that defendant was liable therefor, and that A.'s knowledge of the incumbrances was not imputable to the plaintiff. *Peabody Building and Loan Association v. Houseman* (Penn.), 757.
2. **County treasurer's liability for money lost by failure of depository.]** A county treasurer is liable for the public money lost by the failure of a bank in which he deposited it, although the county provided no safe place for such deposit. *Lowry v. Polk County* (Iowa), 114.
3. **Extortion — action to recover illegal fees voluntarily paid.]** A United States shipping commissioner had illegally charged a seaman, who had paid the legal shipping fee, an additional shipping fee for reshipments on the same vessel for subsequent successive voyages. The seaman paid the fees without protest. *Held*, that an action would lie to recover them in the State court. *American Steamship Co. v. Young* (Penn.), 748.
4. **Public — vacancy in — representative in Congress.]** The charter of the city of Brooklyn prohibits every alderman from holding "any other public office," and provides that by election to and acceptance of "such public office," "his office as such alderman shall immediately become vacant," and a special election shall be held to fill the vacancy. An alderman was elected representative to Congress, and accepted the office. *Held*, that his office as alderman immediately became vacant ; no judicial proceeding was necessary to determine his title ; and it was the duty of the defendant to order a special election to fill the vacancy. *People ex rel Kelly v. Common Council of Brooklyn* (N. Y.), 659.

See MUNICIPAL CORPORATION, 804.

ORDER.

See NEGOTIABLE INSTRUMENTS, 18.

ORDINANCE.

See NEGLIGENCE, 726.

PARENT AND CHILD.*See* MARRIAGE, 107, 271.**PARTNERSHIP.****Acceptance of note of one partner for firm debt.]** *See* ACCORD AND SATISFACTION, 601.**PAYMENT.****Check—laches in presenting.]** A debtor gave his creditor the check of a third party, payable to bearer and not indorsed, which the creditor kept twenty-six days before presenting it; on presentation it was not paid, owing to the suspension of the bank; the drawer had no funds in the bank at the time of drawing the check, but the president testified that it would have been paid if presented before suspension; the check was not received by the creditor in payment; and being dishonored was returned to the debtor and by him to the drawer, who promised to pay the amount to the debtor; *held*, that the debt was not discharged. *Morris v. Kennedy* (Kans.), 169.**Waiver of defective performance by.]** *See* CONTRACT, 86.**Extension of time of.]** *See* SURETY, 79.*See* NEGOTIABLE INSTRUMENTS, 185.**PHYSICIAN.****And patient.]** *See* FRAUD, 731.**Testimony of.]** *See* STATUTORY CONSTRUCTION, 433.**POLICE.***See* MUNICIPAL CORPORATION, 154.**PRINCIPAL AND AGENT.***See* AGENCY.**PRIVILEGED COMMUNICATION.***See* SLANDER AND LIBEL, 403.**PROMISSORY NOTE.***See* EVIDENCE, 696; NEGOTIABLE INSTRUMENTS.**PROTEST.****Waiver of.]** *See* NEGOTIABLE INSTRUMENTS, 222.**RAILROAD.***See* MECHANICS' LIEN, 124; NEGLIGENCE, 167.**RAILWAY.****Street, removal of snow by.]** *See* NEGLIGENCE, 203.

REAL PROPERTY.

Or personal.] Slabs, sawdust, shaving, and other refuse used to fill up low or marshy ground are realty, but slabs and pieces of lumber suitable for firewood, piled up on land, and intended to be used and removed as firewood, are personalty. *Jenkins v. McCurdy* (Wis.), 841.

RECEIVER.

See NATIONAL BANK, 467.

RECORDER.

Action against, for imperfect search.] *See* OFFICE AND OFFICER, 757.

REFORMATION.

Of insurance policy.] *See* INSURANCE, 607, 655.

Of deed.] *See* DEED, 613.

RELIGIOUS SOCIETY.

1. Levy on property of, on judgment for pastor's salary.] The pastor of a religious society got judgment against the trustees for his salary, and a levy was made on the church communion service. *Held*, invalid. *Lord v. Hardie* (N. C.), 683.

2. Mandamus to compel restoration to membership.] A mandamus will not lie to compel a religious society to restore to membership one who had been expelled by a decree of the legally constituted church judicatory, on account of an alleged violation of some law of the society; and the ground that such restoration is necessary to enable him to enjoy the right of sepulture acquired by him as a member is premature. *State ex rel. Soares v. Hebrew Congregation "Dispersed of Judah"* (La.), 217.

REPLEVIN.

For share of mass of grain.] Where several own cereal grain, of the same kind and value, mingled together by their consent, or by reason of circumstances reasonably to be foreseen, each may maintain replevin for his just proportion. *Piazzek v. White* (Kans.), 211.

REPRESENTATIONS.

False.] *See* FRAUD, 171.

RES ADJUDICATA.

See JUDGMENT, 570, 655.

SALE.

1. Delivery — foreign statute — bona fide purchaser.] Williams bought of plaintiffs, at Savannah, Georgia, 118 bales of cotton, giving therefor his checks on Bryan & Hunter, of the same place, having previously put the

SALE—*Continued.*

latter in funds by his draft on defendants to their order, and otherwise. Plaintiff delivered sixty bales to Williams, and it was shipped by Williams to defendants, at New York, the bill of lading being in his name and having attached thereto the draft indorsed by B. & H. Defendants paid the draft on presentation, the amount being more than the price of the sixty bales, and the transaction being according to their custom with Williams and received the cotton without knowledge of any claim on it. One of the checks on B. & H., being post-dated, was dishonored, and plaintiffs brought replevin for forty-five bales, part of the sixty, relying on a statute of Georgia which provides that "cotton, rice, and other products sold by planters and commission merchants on cash sale shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, although it may have been delivered into the possession of the buyer." *Held*, that the action could not be maintained; that assuming that the statute was part of the contract, it simply made the delivery conditional, affected nothing but the delivery, and could not affect the rights of a *bona fide* purchaser in this State; and the sale being absolute and unconditional, title passed to defendants. *Comer v. Cunningham* (N. Y.), 626.

2. **Heavy machinery — tender — action for price.]** In case of an agreement to manufacture and deliver heavy machinery, an actual tender is not necessary, but readiness and an offer to deliver is sufficient to maintain an action for the price. *Smith v. Wheeler* (Or.), 698.

3. **Warranty — vendee's knowledge of defect.]** When one buys machinery, with a warranty, but receives and puts it in operation with knowledge that it is defective, he cannot recover damages for the breach during the time of such use. *Nye v. Iowa City Alcohol Works* (Iowa), 121.

Or bailment.] *See* BAILMENT, 119.

Illegal, of liquor.] *See* CRIMINAL LAW, 374.

SCHOOLS.

Act for uniform text-books.] *See* CONSTITUTIONAL LAW, 450.

See GARNISHMENT, 421.

SELF-DEFENSE.

See ASSAULT, 508.

SET-OFF.

See NATIONAL BANK, 467.

SHIPS AND SHIPPING.

Federal navigation laws — row-boat.] A steamer is not bound to change her course for a row-boat, under the Federal navigation laws, and in case of collision it is error to charge that the party committing the injury is only excused by such inevitable accident as human foresight under the circumstances could not have prevented. *Philadelphia and Reading Railroad Co. v. Adams* (Penn.), 721.

SLANDER AND LIBEL.

1. **Evidence of pecuniary standing of defendant.]** In an action of slander the pecuniary standing of the defendant may be shown to indicate the influence of his speech, but not in itself to enhance damages. *Brown v. Barnes* (Mich.), 875.
2. **Of city physician — privileged communication.]** A publication in a newspaper of a false statement that a city physician, who is appointed by the common council and not publicly elected, has caused the death of a patient by malpractice, is not privileged and is libellous. *Foster v. Scripps* (Mich.), 403.
3. **Words imputing to wife crime committed jointly with her husband.]** An action of slander will lie for words imputing to a wife the commission of a felony jointly with her husband, but not in his presence. *Nolan v. Traber* (Md.), 277.

STATUTE.

Foreign, effect of.] See SALE, 626.

Unconstitutional.] See CARRIER, 70.

STATUTE OF FRAUDS.

Promise to pay for lands to be deeded to another.] An oral agreement by a A with B to pay for land to be deeded by him to C is void, although B deeds the land accordingly. *Liddle v. Needham* (Mich.), 859.

STATUTORY CONSTRUCTION.

1. **Evidence — physician's disclosure.]** Under a statute prohibiting the disclosure by a physician of information acquired in professional attendance and necessary to enable him to prescribe, in an action for damages for a personal injury by defendant's violence, a physician is not precluded from divulging the plaintiff's admission to him that the injury existed before the defendant's act, unless it affirmatively appeared that the disclosure was necessary to enable him to prescribe. *Campau v. North* (Mich.), 433.
2. **"Laborer" — Liability of stockholders for debt of.]** An assistant chief engineer of a railroad company is not a "laborer" within the meaning of provisions rendering the stockholders of corporations liable for labor debts. *Breakway v. Jones* (Mich.), 343.

STOCKHOLDER.

See STATUTORY CONSTRUCTION, 343.

STOCKS.

See CONTRACT, 390.

STORAGE.

See BAILMENT, 119.

STREET.

Ejectment for.] See MUNICIPAL CORPORATION, 499.

Obstructions in.] See MUNICIPAL CORPORATION, 867.

See DAMAGES, 203 ; HIGHWAY, 811.

SURETY.

1. **Bond not signed by principal.]** A surety is not bound by an official bond not signed by a principal named therein, but delivered without the surety's knowledge or consent, and the burden of proving such consent is on the plaintiff. *Johnston v. Kimball Township* (Mich.), 872.
2. **On official bond — laches of obligee.]** A surety on the bond of the treasurer of a secret society, conditioned for the faithful application of the trust moneys, cannot evade liability for a misappropriation by the mere fact that the treasurer had misappropriated the trust funds in the preceding year, to the knowledge of the officers and members of the society, but not of the surety, and had been re-elected without any communication of such defalcation to the surety. *Roper v. Sangamon Lodge* (Ill.), 60.
3. **Previous defalcation.]** Where a treasurer is re-elected, reporting a certain sum of trust moneys in his hands from the preceding term, the sureties on his official bond for the new term must answer for any defalcation in that sum, and cannot throw the responsibility therefor on the sureties of the former bond. *Id.*
4. **Evidence — judgment against principal in bond.]** A judgment against the principal obligor in an official bond, showing upon its face that it was recovered for a breach of the conditions, is *prima facie* evidence of the plaintiff's right to recover against the sureties, and of the amount of such recovery, although they had no notice of the action. *Stephens v. Shafer* (Wis.), 793.
5. **Extension of time of payment — taking promissory note.]** In an action on a bond, executed by principal and surety, for the faithful accounting by the principal for the obligee's moneys received by him as agent, the surety answered, alleging that on a settlement between the principal and obligee, the former executed to the latter a note for the amount found due, payable at a future day, but did not allege any agreement for extension of the time of payment of the bond, nor that the note was negotiable. *Held*, no defense. *Lindeman v. Rosenfield* (Ind.), 73.
6. **Discharge of, by extension of time of payment in consideration of usurious interest in advance.]** An agreement between indorsee and principal maker of a note, to extend the time of payment for a definite period, in consideration of usurious interest paid in advance, discharges a surety on the note, who was known to the indorsee so to be when he took the note. *Stillwell v. Aaron* (Mo.), 517.
7. **Negotiable instrument.]** An apparent principal maker of a note, known by the holder at the time of execution to be a mere surety, will not be discharged by successive usurious agreements, between the payee and

STREET — Continued.

principal maker of a note, for extension of the time of payment, followed by payment of the usurious consideration after the expiration of such extended time, there being no suspension of the payee's right to enforce payment. *Irvine v. Adams* (Wis.), 817.

See INFANCY, 838; NEGOTIABLE INSTRUMENTS, 76.

SURFACE WATER.

See MUNICIPAL CORPORATION, 304, 470.

SUNDAY.

Feeding hogs on.] *See* CRIMINAL LAW, 110.

Liquor law.] *See* CONSTITUTIONAL LAW, 224.

TAXATION.

1. **Butcher not a "dealer."]** One who slaughters and cuts up animals, and sells the meat as food, is not a "dealer" within the meaning of a statute requiring dealers who buy and sell goods, etc., to take out a license. *State v. Yearby* (N. C.), 694.
2. **Of corporate stock to owner independently of corporation tax.]** Stock of a corporation may be taxed to the owner, independently of taxation upon the corporate franchises and property. *Belo v. Commissioners of Forsyth County* (N. C.), 688.
3. **Stock in foreign corporation — to owner.]** Stock in a foreign corporation may be taxed to the resident owner. *Worth v. Commissioners of Ashe County* (N. C.), 692.
4. **Residence — change, when not presumed.]** For purposes of taxation, a residence, once acquired, will not be presumed to be changed from the mere fact, that leaving his family, a man has gone elsewhere and entered into business. *Nugent v. Bates* (Iowa), 117.

TENANCY.

By curtesy.] *See* FRAUD, 710.

See DEED, 266.

TENANTS IN COMMON.

Liability of one to respond to other for produce of property.] In the absence of an agreement, or the exclusion by one of the other from the land, one co-tenant cannot recover of another the avails of the crops raised on the common property, which he has appropriated to his own use, although the statute permits the recovery of his proportion of the "rents and profits." *Kean v. Connelly* (Minn.), 458.

TENDER.

See SALE, 698.

TRADE-MARK.

Name of publication.] The complainant had for some twenty years published an almanac entitled "J. Gruber's Hagerstown Town and County Almanack," which had been established and long published by his ancestor. The defendant, in 1879, issued an almanac, with the same emblems, devices, marks, representations, and general exterior appearance, and entitled, "T. G. Robertson's Hagerstown Almanac." *Held*, that the defendant's publication would be enjoined. *Robertson v. Barry* (Md.), 828.

TRESPASS.

Joint liability.] In an action of trespass against two or more acting independently, and producing a result injurious to the plaintiff, one cannot be held for the acts of the others. *Blaisdell v. Stephens* (Nev.), 522.

TRIAL.

See CRIMINAL LAW, 215.

TROVER.

See DAMAGES, 64.

TRUST.

By precatory words.] *See WILL, 286.*

USURY.

By agent—husband and wife.] Where a husband, as agent for loaning his wife's money, takes a commission for himself beyond the rate of legal interest, without his wife's knowledge or consent, the loan is not vitiated for usury. *Brighton v. Myers* (Iowa), 140.

Discharge of surety by.] *See SURETY, 517.*

See CONTRACT, 671.

VACANCY.

In office.] *See OFFICE, 659.*

VOLUNTARY CONVEYANCE.

See MARRIAGE, 167.

WAIVER.

Of exemption.] *See EXEMPTION, 152.*

Of lien.] *See BAILMENT, 809.*

Of protest.] *See NEGOTIABLE INSTRUMENTS, 232.*

See INSURANCE, 651 ; MECHANICS' LIENS, 702.

WAREHOUSEMAN.

Reasonable care — evidence of custom.] On September 9, 1876, the plaintiff shipped from Boston to Baltimore, by defendant's steamer, boxes of books, under a bill of lading providing that freight must be removed from the wharf, at the place of discharge, during business hours on the day of discharge, or it was liable to be stored at the risk and expense of the owner; all merchandise at the owner's risk while on the wharf. The steamer arrived at Baltimore on the 12th of September, and the goods were on that day discharged, and put on the defendants' wharf, but not on the highest part. A notice was the same day mailed to the plaintiff, stating that the goods were ready for delivery and must be removed within twelve hours, or they would be stored at the plaintiff's risk and expense. The plaintiff did not receive this notice, and he did not call for his books until the 18th. On Sunday, the 17th, an unusually violent storm of rain and south-east wind occurred, and flooded the wharf. This was the first time the part of the wharf where these goods were stored had been submerged, although in a period of twenty years another part had been flooded, the water then rising to within a few inches of the part in question. The wharf was well covered, and ordinarily was secure for storage, and watchmen were employed night and day. Signs of a violent storm and rise of water were noticed before eight o'clock of the morning in question; the water rose steadily all day until 2 P. M., and then suddenly rushed over the wharf. The watchman did all he could to remove the goods, but was unable, owing to the rise of the water and the absence of assistance, to save them. *Held*, that the defendant had not used due and reasonable care, and that evidence of its custom to store goods on the wharf was properly rejected. *Merchants and Miners' Transportation Company v. Story* (Md.), 293.

WARRANTY.

See INSURANCE, 830; SALE, 121.

WILL.

1. **Construction of bequest.]** A will provided, "To my wife the provision made for her by the statutes of this State I deem sufficient;" and after giving sundry legacies, concluded by giving to the testator's son, "all the residue of my estate after paying the above bequests, legacies, and my debts and the expenses of settling my estate." *Held*, that the wife took such a share as if the testator had died intestate. *Kelly v. Reynolds* (Mich.), 418.
2. **Devise and bequest — manufactory and "personal property therein and thereto belonging."]** A testator provided as follows: "I hereby give, devise and bequeath to my son S. and to his heirs and assigns forever, upon his attaining the age of twenty-one years, all my Shot Tower property, consisting of Shot Tower, buildings and lots of ground connected therewith * * * with all the appurtenances, machinery, fixtures and

WILL — *Continued.*

personal property therein and thereto belonging." At the testator's death there was in the Shot Tower a large quantity of manufactured shot and of unmanufactured material. It was apparent from the will that the testator intended that his son should carry on the business on coming of age. *Held*, that the son was entitled to the unmanufactured shot but not to the manufactured shot. *Spark's Appeal* (Penn. St.), 740.

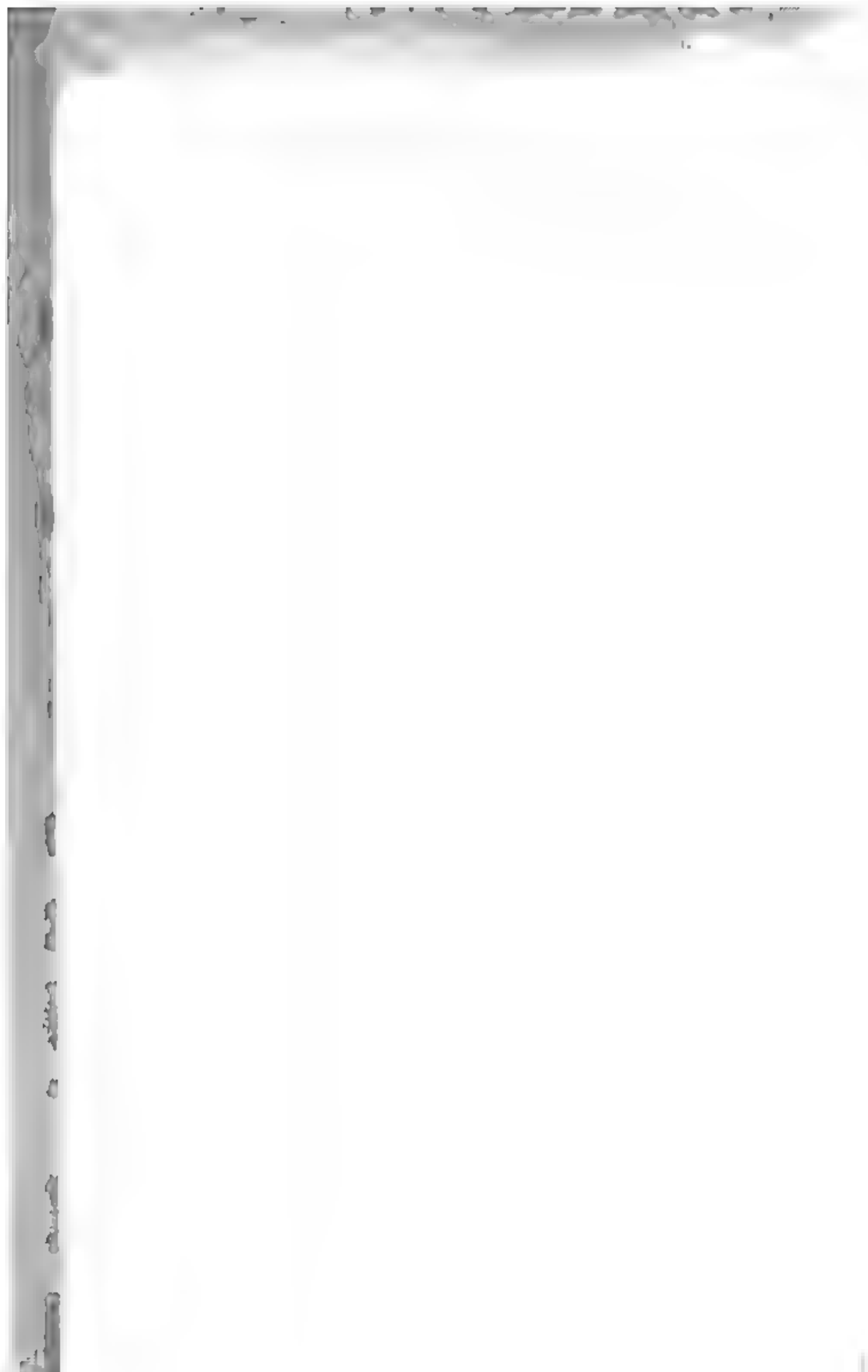
3. **Precatory words — when creating trust.]** A testator provided as follows: "It is my will and desire, and I hereby devise and bequeath all my property, real, personal and mixed, to my dear wife E. A., and her heirs and assigns forever, and it is my request and desire that my said wife E. A. should by last will and testament devise and bequeath all of said property at her death remaining in her possession to my friend B. W., and to E. W., their heirs and assigns forever, share and share alike." *Held*, that this did not create any trust, but that E. A.'s estate was absolute. *Williams v. Worthington* (Md.), 286.

WITNESS.

Disqualification for felony.] The conviction of one of felony in another State does not disqualify him as a witness in this. *National Trust Co. v. Gleason* (N. Y.), 682.

WORDS.

- "Annually."] *See* NEGOTIABLE INSTRUMENTS, 370.
 "Dealer."] *See* TAXATION, 694.
 "Fiduciary capacity."] *See* BANKRUPTCY, 641.
 "Happens."] *See* CONSTITUTIONAL LAW, 771.
 "Laborer."] *See* STATUTORY CONSTRUCTION, 348.
 "Process."] *See* DRED, 784.
 "Satisfaction."] *See* CONTRACT, 851.
 "Vacancy."] *See* CONSTITUTIONAL LAW, 771.





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